Supreme Court, U.S.
①
FILED
99 883 NOV 23 1999

No. ______ OFFICE OF THE CLERK

In The

Supreme Court of the United States

◆

SCOTT BRADLEY; MARY BRAVO;
ROBERT DONALDSON; PIMA COUNTY,
ARIZONA, a body politic,

Petitioners,

v.

JOHN H. KELLY, in his capacity as Director of
Arizona Health Care Cost Containment System;
and THE STATE OF ARIZONA,

Respondents.

◆

On Petition For Writ Of Certiorari To The Court Of Appeals, State Of Arizona, Division One

◆

PETITION FOR WRIT OF CERTIORARI

◆

Howard Baldwin
22 East University Boulevard
Tucson, Arizona 85705-7737
(520) 624-8527 phone
(520) 624-2418 fax

Attorney and Counsel of Record
for Petitioners

158pv

QUESTIONS PRESENTED

1. Is due process or federal Medicaid law violated when state Medicaid benefits are terminated without notice or hearing?

2. Are organ transplants a required service under Medicaid law for categorically eligible persons?

3. May a state grant organ transplants to one class of persons and deny it to another class, who have the same disability, based solely on the fact the former class is categorically eligible and the latter is MN/MI eligible, without violating the "similarly situated" requirement?

PARTIES TO THE PROCEEDING

The parties on the caption were the same parties before the Arizona Supreme Court and through all proceedings in the Arizona courts and administrative proceedings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

Scott Bradley 3

Robert Donaldson 5

Mary Bravo 6

Common Factors 6

Decisions 7

SUMMARY OF ARGUMENT AND REASONS THIS PETITION MUST BE GRANTED 9

BOTH DUE PROCESS AND FEDERAL MEDICAID LAW WERE VIOLATED WHEN BRADLEY'S AND DONALDSON'S CATEGORICAL ELIGIBILITY WAS TERMINATED WITHOUT NOTICE OR HEARING 10

Due Process 10

Regulatory Requirements 12

A Hearing Would Have Established Additional Grounds for Categorical Eligibility 13

TABLE OF CONTENTS – Continued

Page

ORGAN TRANSPLANTS ARE NOT A REQUIRED SERVICE UNDER MEDICAID STATUTES OR REGULATIONS FOR CATEGORICALLY ELIGIBLE PERSONS 14

A STATE MAY NOT GRANT ORGAN TRANSPLANTS TO ONE CLASS OF PERSONS AND DENY IT TO ANOTHER CLASS, WHO HAVE THE SAME DISABILITY, BASED SOLELY ON THE FACT THE FORMER CLASS IS CATEGORICALLY ELIGIBLE AND THE LATTER IS MN/MI ELIGIBLE WITHOUT VIOLATING THE "SIMILARLY SITUATED" REQUIREMENT 15

CONCLUSION 19

APPENDIX

Table of Contents .... App. i

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985) 15, 17

Bradley, et al. v. Kelley, et al., 1 CA-CV98-0311 (Ariz. App. 1999) 1

Bradley, et al. v. Kelley, et al., CV-99-0131-PR (Ariz. 1999) 1

Crippen v. Kheder, 741 F.2d 102 (6th Cir. 1984) 11

Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992) 14, 16, 17

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) 11

Granato v. Bane, 74 F.3d 406 (2nd Cir. 1996) 11

J. K. v. Dillenberg, 836 F.Supp. 694 (D. Ariz. 1993) 11

Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983) 11

Meusberger v. Palmer, 900 F.2d 1280 (8th Cir. 1990) . . 14, 17

Perry v. Chen, 985 F.Supp. 1197 (D. Ariz. 1996) 11

Rodriguez v. Chen, 985 F.Supp. 1189 (D. Ariz. 1996) 11

Salgado v. Kirschner, 179 Ariz. 301, 878 P.2d 659, (1994), *(en banc) cert. denied*, 513 U.S. 1151 (1995) 17

CONSTITUTION, STATUES AND REGULATIONS

Federal:

U.S. Const. amend. XIV . . . . *passim*

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES - Continued

Page

42 U.S.C § 1396a(a)(10)(A)(i)(II) 2, 13

42 U.S.C § 1396a(a)(3) 2

42 U.S.C § 1396b(i) 3, 17, 18

42 U.S.C § 1396d(q) 2, 13

42 C.F.R 431.201 2

42 C.F.R 431.206 . . . . 2, 12

42 C.F.R 431.210 . . . . 2, 12

42 C.F.R 431.211 2

42 C.F.R 431.230 . . . . 2, 12

42 C.F.R 431.243 . . . . 2, 14

42 C.F.R 435.120 . . . . 3, 13

42 C.F.R 435.902 2

STATE:

A.R.S. § 36-2907 . . . . 17, 18

A.A.C. R9-22-341 12

OTHER:

P.L. 99-272 § 9507 15

P.L. 100-203 House Report No. 100-391 16

House Conf. Report No. 100-495 16

PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review an improper decision of the Arizona Court of Appeals for which review was denied by the Arizona Supreme Court.

◆

OPINION BELOW

The memorandum decision of the Arizona Court of Appeals is an unreported decision numbered 1 CA-CV98-0311. The denial of review by the Arizona Supreme Court is numbered CV-99-0131-PR.

◆

GROUNDS FOR JURISDICTION

1. The Court of Appeals of the State of Arizona, Division One, entered its memorandum decision on February 23, 1999. (App. 1)

2. The petition to the Arizona Supreme Court to review the decision of the Court of Appeals was denied on August 30, 1999. (App. 14)

3. The mandate from the Arizona Court of Appeals issued September 20, 1999. (App. 12)

4. Jurisdiction here is based upon 28 U.S.C. § 1257(a).

◆

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Section One of the Fourteenth Amendment provides in part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (App. 53)

2. 42 U.S.C. § 1396a(a)(3) (App. 67), and Medicaid regulations 42 C.F.R. 431.201; 431.206; 431.210; 431.211; and 431.230 set forth requirements for notice, right to hearing, continuation of benefits and other measures when Medicaid agencies terminate or suspend Medicaid benefits. (App. 58-61)

3. 42 C.F.R. 435.902 requires that the Medicaid agency policies contain provisions to determine eligibility in a manner that is in the best interests of recipients. (App. 62)

4. 42 C.F.R. 431.243 requires that if the agency holding the hearing is not responsible for the eligibility determination, the responsible agency must also participate. (App. 62)

5. 42 U.S.C. § 1396a(a)(10)(A)(i)(II) states that among the persons who are categorically eligible is the following:

> (II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title), . . .

6. 42 U.S.C. § 1396d(q) and 42 C.F.R. 435.120 recognize qualified severely impaired individuals as a class of categorically eligible persons and establishes a mechanism and criterion for determining uninterrupted eligibility for a former SSI categorically needy person. (App. 63-65)

7. 42 U.S.C. § 1396b(i) in relation to organ transplants requires: " . . . similarly situated individuals are treated alike . . . " (App. 66)

◆

STATEMENT OF THE CASE

Scott Bradley, Robert Donaldson and Mary Bravo are three Arizona residents who were dying from terminal diseases but who would survive if allowed organ transplants. They were refused organ transplants by Arizona's Medicaid Agency, the Arizona Health Care Cost Containment System (AHCCCS). Their lives were saved when the remarkably humane Pima County Board of Supervisors voted to pay for each of the transplants and then to seek recovery from AHCCCS based upon an assignment of rights from Bradley, Donaldson and Bravo.

Scott Bradley:

In 1993, Scott Bradley, then age 40, was diagnosed as having a terminal heart condition known as idiopathic cardiomyopathy, thought to have been caused by a viral infection. His condition was so severe that only a heart transplant would sustain his life. He had been a wage earner for approximately 25 years at the onset of his illness. He also was married, had a two year old son and his wife was expecting their second child.

Scott Bradley could no longer work. He and his family became eligible for Aid to Families with Dependent Children (AFDC). Also, as a result of receiving the AFDC, he became categorically or mandatorily eligible for AHCCCS coverage. Because he was receiving AFDC, Scott Bradley was required by the Arizona Department of Economic Security (DES) to make application for Supplemental Security Income (SSI) or Social Security Disability (SSD).

He was found eligible for SSI payments retroactive as of March 1993. At the same time, for purposes of SSD, he was determined to be disabled and unable to work as of February 14, 1993. His entitlement for SSD began as of August 1993 and he could not refuse to accept the payment in order to maintain his eligibility for AFDC or SSI.

His monthly income from SSD, based upon his previous payments into Social Security, was $701.00 per month. This resulted in his eligibility for SSI and AFDC being terminated as of August 1993 because the payments received from SSD caused him to be over the allowable income limits. As a result, he also lost his categorical/ mandatorily eligible status for Medicaid coverage. AHCCCS failed to notify Scott Bradley of the termination of his categorical status or that he had a right to appeal and AHCCCS failed to notify him of ways by which to continue his categorical eligibility such as a "qualified severely impaired individual."

By "spending down" as a result of his large medical bills, Scott Bradley was able to retain his eligibility for

Medicaid as a medically needy/medically indigent (MN/MI) person and was so eligible when he received his heart transplant on January 24, 1995.

Robert Donaldson:

At the time of his liver transplant, Robert Donaldson was a 38 year old divorced parent of three children. He was diagnosed with a fatal liver disease in 1993. Robert Donaldson had worked most of his adult life prior to his illness. He was employed as a maintenance technician for an automobile rental agency. He became unable to work because of his liver disease in approximately 1993. He became categorically/mandatorily eligible when he became eligible for SSI payments on May 1, 1994. He then became eligible for SSD. As a result of receiving SSD, he became ineligible beginning November 1, 1994 for categorical coverage.

AHCCCS failed to notify Robert Donaldson in writing of his loss of categorical eligibility and right to appeal. AHCCCS also failed to notify him of ways by which to continue his categorical eligibility such as a "qualified severely impaired individual." Robert Donaldson applied as an MN/MI eligible person and as a result of spending down he was MN/MI eligible for Medicaid as of January 24, 1995. Robert Donaldson received his liver transplant at Good Samaritan Regional Medical Center on January 24, 1995.

Mary Bravo:

Mary Bravo, a married woman, was born July 2, 1935, and was found to be disabled for purposes of Social Security Disability payments retroactive to February 2, 1993. Prior to that time, she had worked as a club manager for the American Legion. She was diagnosed in 1993 as having idiopathic cardiomyopathy, and since that time had multiple hospitalizations for congestive heart failure. She received a heart transplant at University Medical Center on November 23, 1994.

Mary Bravo originally became eligible for MN/MI Medicaid status January 1994. She had applied for SSI benefits, but was determined not to be eligible because of family income. She was, however, eligible for SSD because she was a wage earner. After receiving the SSD benefits, she became ineligible for Medicaid, but further medical expenses made her MN/MI Medicaid eligible again at the time of the transplant as a result of spending down.

Common Factors:

Scott Bradley, Robert Donaldson and Mary Bravo were all recipients of SSD at the time of their transplants. Persons who are eligible for SSD are also eligible for Medicare which would cover the transplants. However, Medicare does not become effective until the expiration of two years from the initial receipt of SSD payments. None of them would have survived that period of time.

A person is determined to be eligible for SSD based upon past earning of wages. The amount of past wages also determines the amount of SSD that will be paid. Scott Bradley, Robert Donaldson and Mary Bravo could not refuse the SSD in order to continue to receive SSI to establish or preserve their status of categorical eligibility for Medicaid. It is undisputed that if any of the parties here were considered to be categorically eligible by AHCCCS at the time of their transplants, they would have been allowed an organ transplant by AHCCCS.

Each of the three transplants were medically necessary. The period of time between when a person needs an organ transplant and can actually receive it is conditioned upon the availability of an organ and an adequate physiological condition to receive the transplant. Throughout this time period, which could be several months, a person is in immediate and emergent need of a transplant.

Decisions:

Pima County appealed the denial of the organ transplants to AHCCCS, where an administrative hearing was held on April 2, 1996. Petitioners first raised their Constitutional and federal questions in their opening arguments and later in their post hearing memoranda. (App. 32) John H. Kelly, the acting director of AHCCCS, rendered an opinion on June 27, 1996 ruling that none of the Petitioners were categorically eligible and rejected Petitioners' Constitutional and federal law issues. (App. 20)

Petitioners filed an action in the Superior Court of Arizona pursuant to the Arizona Administrative Review Act. The Constitutional and federal law questions were raised again in the Superior Court. (App. 72) The Superior Court Judge Michael J. O'Melia entered a judgment in favor of Petitioners finding that the failure to provide the notices of termination and right to appeal resulted in Bradley and Donaldson continuing to be categorically eligible and that Bravo was eligible because she was similarly situated to other Medicaid beneficiaries who were eligible for transplants. (App. 16)

AHCCCS appealed to the Arizona Court of Appeals, and Petitioners again presented the same Constitutional and federal law arguments as they had from the beginning. (App. 4-10)

The Court of Appeals ruled on February 23, 1999 that AHCCCS erred by not sending the notice of right to hearing and appeal, but concluded there was no proof that Bradley and Donaldson would have received transplants pending the appeal or that they would have proven that they would be eligible in some other categorically eligible designation. (App. 4-7)

The Court of Appeals determined that Mary Bravo was not "similarly situated" under federal law because she was MN/MI eligible and not categorically eligible. (App. 7-9)

Petitioners filed a Petition for Review to the Arizona Supreme Court on March 25, 1999, again arguing the same Constitutional and federal law questions they had raised since the beginning. (App. 111) On August 30, 1999, the Arizona Supreme Court denied the Petition for Review without comment or opinion. (App. 14)

◆

SUMMARY OF ARGUMENT AND REASONS THIS PETITION MUST BE GRANTED

This Court should exercise its supervisory powers and grant this petition in order to correct the departure from federal constitutional law taken by the Arizona Court of Appeals and sanctioned by the Arizona Supreme Court. The due process rights and federal law rights of Medicaid recipients in this state must be vindicated by the Court by making it clear that consequences must result if a state fails to give proper notice and the right to a hearing as it did with Bradley and Donaldson. The only way the state Medicaid agency and the appellate courts will rectify the problem is to be told by this Court to do so.

Secondly, this Court needs to settle the question of what "similarly situated" means in the context of Medicaid covered organ transplants. Organ transplants are not a mandated or required service for categorically eligible persons, yet Arizona has arbitrarily concluded transplants must be restricted to categorically eligible Medicaid beneficiaries and not be available to MN/MI eligible Medicaid beneficiaries.

There have been differing opinions by the federal courts and state courts both as to the context of the term similarly situated and as to the meaning. Congress intended the term to have a broad meaning to embrace all Medicaid eligible persons in need of organ transplants and to treat them the same. This is one area where Congress did not intend to allow more benefits to one eligible category and not the other. That is why organ transplantation is the only category in the hundreds of categories of covered medical services that have as a condition to the service that it must be made available to all of those persons "similarly situated".

Persons who cannot pay for a transplant because they never worked (SSI recipients) and persons with the same disability who did work but became poor attempting to pay for their medical needs (SSD recipients) are indeed similarly situated. Persons who on one day are categorically eligible but on the next day are MN/MI eligible who have the same disability and need the same organ transplant are most certainly similarly situated. This Court needs to make these truths the law to guide not only Arizona but all of the states in formulating their organ transplant policies in compliance with the rights of the Medicaid beneficiaries.

◆

BOTH DUE PROCESS AND FEDERAL MEDICAID LAW WERE VIOLATED WHEN BRADLEY'S AND DONALDSON'S CATEGORICAL ELIGIBILITY WAS TERMINATED WITHOUT NOTICE OR HEARING

Due Process

Bradley and Donaldson were not given what AHCCCS calls the JASSO notice when their categorical eligibility was terminated. The JASSO notice should have advised them of the termination and the right to appeal the termination.[1] The appeals court erroneously concluded that lack of notice did not matter. It was wrong.

---

[1] JASSO is not an acronym but rather the last name of a person who lobbied for the federal law that requires the notice.

The result is a blatant violation of Bradley's and Donaldson's rights of due process.

This Court has ruled that due process requires meaningful notice prior to the termination of health care benefits. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

The federal courts in Arizona have several times chastised AHCCCS for its sloppy notice and hearing procedures for violating due process and Medicaid regulations. *J. K. v. Dillenberg,* 836 F.Supp. 694 (D. Ariz. 1993); *Perry v. Chen,* 985 F.Supp. 1197 (D. Ariz. 1996); and, *Rodriguez v. Chen,* 985 F.Supp. 1189 (D. Ariz. 1996).

Each of the foregoing cases found due process violations for lack of proper notice and failure to provide a pre-termination of benefits hearing. The consequence to AHCCCS was to continue the eligibility of those persons affected.

There is also a line of circuit court cases based upon due process and the Medicaid regulations which require that eligibility as a categorically eligible person be continued until the state Medicaid agency determines if such person is MN/MI eligible. *Granato v. Bane,* 74 F.3d 406 (2nd Cir. 1996); *Crippen v. Kheder,* 741 F.2d 102 (6th Cir. 1984); *Massachusetts Ass'n of Older Americans v. Sharp,* 700 F.2d 749 (1st Cir. 1983).

In all of the foregoing cases, a requirement that the benefits continue until a determination could be made that the person in question became MN/MI eligible was a sufficient remedy because the benefits were the same for those persons whether they were categorically eligible or MN/MI eligible. No distinction was necessary.

Here, however, a different remedy has to be fashioned because Arizona did not allow organ transplants for MN/MI Medicaid eligible persons but did allow them for categorically Medicaid eligible persons. That remedy is to find that Bradley and Donaldson were continued in their categorical status until they were transplanted. That is the consequence of failing to give proper notice and a right to a hearing. It is the only just resolution.

Regulatory Requirements

The Medicaid regulations themselves also serve as a basis for a solution. 42 C.F.R. 431.206 and 431.210 set forth explicit requirements for notice and hearings upon termination of benefits which should have been followed by AHCCCS. (App. 59-60) 42 C.F.R. 431.230 requires that AHCCCS may not terminate or reduce services **until** a decision is rendered **after** the hearing. (App. 61-62)

If the foregoing is compared with the Arizona AHCCCS regulation A.A.C. R9-22-341 which purports to require notice and gives a backhanded reference to an "appeal", it is obvious the regulation does not comply with the federal regulations. Thus, even if AHCCCS made an attempt to give notice, there could have been no compliance in behalf of Bradley and Donaldson because it would not have been adequate notice. The only remedy is that Bradley and Donaldson should be deemed to have continued their eligibility. Only then perhaps will AHCCCS be made to realize it must follow federal law.

A Hearing Would Have Established Additional Grounds for Categorical Eligibility

The Arizona court of appeals felt that the burden should be on Bradley and Donaldson to prove that they could have remained categorically eligible if notified of the right to a hearing and granted a hearing. This was a clear and grievous error on the part of the appellate court. However, if proof be needed, Bradley and Donaldson indeed could prove that they were eligible under another component of categorical eligibility. 42 U.S.C. § 1396a(a)(10)(A)(i)(II), establishes qualified impaired individuals as categorically eligible if they can meet the requirements of 42 U.S.C. § 1396d(q) (App. 63). 42 C.F.R. 435.120 reinforces the foregoing statutes by stating: "(c) This mandatory categorically needy group of individuals includes those qualified severely impaired individuals defined in section 1905(q) of the Act." (App. 65)

Bradley and Donaldson each met the necessary criteria. Each was under age 65. Both Bradley and Donaldson had received SSI payments. Each continued to have the same disabling physical impairment on the same basis that they originally were found to be disabled. Each, except for their earnings from SSD, continued to meet all non-disability related requirements for disability. Their lack of medical benefits seriously inhibited their ability to obtain employment. Their earnings were insufficient to provide the reasonable equivalent of the medical benefits they had lost. The foregoing are the requirements of § 1396d(q) and Bradley and Donaldson met each requirement. The record of this case provides uncontroverted and unequivocal evidence of such. (See fact statement, App. 34-42)

AHCCCS misled the Arizona appellate court into believing that it was not AHCCCS's job to make the severely impaired eligibility determination and therefore no hearing could have been held. This is not true. 42 C.F.R. 431.243 provides the true answer. It states: "If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing." (App. 62)

Thus, if the determination must be made by the Commissioner of Social Security as the Arizona appellate court was led to believe, then the "Commissioner" or his representative must make the decision pursuant to § 431.243 and he or his representative must participate in the AHCCCS hearing.

◆

ORGAN TRANSPLANTS ARE NOT A REQUIRED SERVICE UNDER MEDICAID STATUTES OR REGULATIONS FOR CATEGORICALLY ELIGIBLE PERSONS

Although this Court has not ruled upon the issue of whether organ transplants are mandatory for categorically eligible persons, some of the circuits have.

The Eighth Circuit has taken the position that organ transplants are not among the required medical services a state must provide to the categorically eligible. *Meusberger v. Palmer*, 900 F.2d 1280, 1282 (8th Cir. 1990). The Ninth Circuit has adopted the same position. *Dexter v. Kirschner*, 984 F.2d 979, 983 (9th Cir. 1992).

Thus, unless this Court disagrees, the state of the law is that organ transplants are not a required coverage for categorically eligible persons under state Medicaid plans. The next question is, "May the state nonetheless discriminate only in favor of categorically eligible persons, or must it treat all Medicaid recipients the same?" It is hoped this Court will issue an opinion precluding the unreasonable discrimination that is occurring to MN/MI eligible Medicaid beneficiaries.

◆

A STATE MAY NOT GRANT ORGAN TRANSPLANTS TO ONE CLASS OF PERSONS AND DENY IT TO ANOTHER CLASS, WHO HAVE THE SAME DISABILITY, BASED SOLELY ON THE FACT THE FORMER CLASS IS CATEGORICALLY ELIGIBLE AND THE LATTER IS MN/MI ELIGIBLE WITHOUT VIOLATING THE "SIMILARLY SITUATED" REQUIREMENT

This Court has established the clear principle that when the state undertakes to cover a category of medical care that is not mandatory, it must do so in a manner that fully complies with federal regulations and statutory law. *Alexander v. Choate,* 469 U.S. 287, 289 n.1, 105 S.Ct. 712, 714 n.1, 83 L.Ed.2d 661 (1985). Two years after *Alexander v. Choate* was decided, Congress enacted the "similarly situated" standard for states that desired to offer organ transplants as an optional coverage. P.L. 99-272 § 9507. (App. 71)

A House Conference Report explains that states choosing to participate in covering organ transplants must see to it that similarly situated individuals are treated alike. House Conf. Report No. 100-495. (App. 70)

In another House report, the intent related to the similarly situated requirement was again expanded upon by adding that the state must treat similarly situated individuals alike and must follow the same rule as for mandatory services, which is that the service must be: "Sufficient in amount, duration, and scope to reasonably achieve its purpose."[2] (App. 68) Nothing whatever in the statute itself or in the legislative history shows any intent to restrict the coverage only to categorically eligible persons. To the contrary, the clear intent was to grant organ transplants broadly to all Medicaid beneficiaries by requiring that "similarly situated individuals must be treated alike."

Congress knew when it used the term similarly situated it was using a term of art that has a rich history of usage in the law of equal protection.

The courts have only recently begun to interpret the scope of similarly situated requirement in organ transplant cases. In *Dexter v. Kirschner,* the Ninth Circuit concluded that the term meant the following: "We conclude that "similarly situated" means all patients who can be treated effectively by the same organ transplant procedure." *supra,* at 986.

---

[2] House Report No. 100-391 I pp. 531-32. (App. 68) Nowhere is there a restrictive reference to categorically or mandatorily eligible beneficiaries, only "Medicare beneficiaries".

The Arizona Supreme Court in following *Dexter* found that: "Thus, to the extent that A.R.S. § 36-2907(A)(11)[3] excludes persons from coverage solely because they are over 21, it is in violation of 42 U.S.C. § 1396b(i)." *Salgado v. Kirschner*, 179 Ariz. 301, 878 P.2d 659, 664 (1994), *(en banc) cert. denied*, 513 U.S. 1151 (1995).

The circuit courts have followed the *Alexander v. Choate* principle that once a state undertakes to provide a service not mandated, it must do so in full compliance with federal law. This principle was expressed in *Meusberger* as follows: "However, once a state has adopted a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient." *supra*, at 1282.

Two principles emerge from the foregoing as gleaned from Congressional intent, statutory law and interpretation by the circuits. Similarly situated organ recipient Medicaid beneficiaries must be treated alike and an otherwise eligible Medicaid recipient may not arbitrarily or unreasonably be denied an organ transplant if the state has previously adopted a policy to cover transplants.

Applying those principles to Bradley, Donaldson and Bravo, the result must be that they indeed should have been covered. The only difference between them and a person who was categorically eligible was how they came to their eligibility. They were similarly situated in every possible way.

---

[3] A similar statutory provision applicable to this case restricted heart and liver transplants to categorically eligible Medicaid beneficiaries in a succeeding version of ARS § 36-2907.

Scott Bradley and Mary Bravo were within the class of persons who could be effectively treated with a heart transplant. Robert Donaldson was within the class of persons who could be effectively treated with a liver transplant. To the extent that the State Medicaid Plan as reflected in A.R.S. § 36-2907 attempted to exclude Bradley, Bravo and Donaldson simply because they were MN/MI eligible Medicaid beneficiaries and not categorically eligible Medicaid beneficiaries, it violates 42 U.S.C. § 1396b(i).

Categorical eligibility is merely a label placed upon a recipient which results from how they became Medicaid eligible (via SSI or AFDC), but it does not make them differently situated. Is it rational to provide benefits to one class who finds themselves without the ability to pay for an organ transplant because they were not employed but not provide the same benefit to another class who were employed but became impoverished by paying for their medical expenses? In both instances, the basis for their eligibility is their poverty and their disability which is predicated upon their medical condition that has deteriorated to the point that only an organ transplant will save their lives.

Congress has recognized that where organ transplants are concerned special considerations must be made. That is why in this sole area they imposed the "similarly situated" standard. That is why artificial eligibility standards are inapplicable and the nature of the disability and type of transplant is what forms the nexus for determining who is similarly situated.

The similarities are even more compelling as applied to Bradley and Donaldson. One day they were categorically eligible. The next day they were not. Should states be allowed to structure their optional organ transplant policy as if it were a game of chance? Should eligibility be Russian roulette? Of course not. That would be arbitrary and capricious, and that is exactly what has occurred here.

◆

CONCLUSION

The State of Arizona has offended the Constitution in two ways. It has denied procedural due process to Bradley and Donaldson by denying their right to notice and their right to a hearing. There is only one remedy for such a blatant denial of due process. That is to consider Bradley and Donaldson eligible at the time of their transplants.

The second Constitutional offense is the denial of equal protection to all three Petitioners. Equal protection requires that similarly situated persons be treated alike. Organ transplantation is not a mandatory coverage. MN/MI is not a mandatory coverage. But when states assume the responsibility of providing optional coverages, they also assume the responsibility of providing those benefits to all eligible Medicaid beneficiaries in a manner that complies with the Constitution, federal statutes and regulations. There is no rational basis to distinguish between categorical or MN/MI eligibility because there are no differences between the need for organ transplants between those who are impoverished initially or those who become impoverished from the medical expense that attends organ failure.

This case can just as easily be decided based upon federal statute and regulation. The Medicaid regulations provide a firm basis for the notice and hearing rights which were so cavalierly violated by Arizona. The Medicaid statutes and regulations provide a road map and clear basis for defining the scope and breadth of the similarly situated Medicaid beneficiaries' right to organ transplants.

Regardless of whether this case is decided on Constitutional or statutory grounds, Arizona needs the supervision of this Court to protect the federal rights of the citizens who are eligible Medicaid beneficiaries. The exercise of such supervision will also provide guidance to other states as a reminder that there must be consequences to states when they violate the due process and federal law rights of their citizens.

The states and federal courts need guidance on how to define the similarly situated standard for Medicaid organ transplants. This case is the proper vehicle for that guidance. It is respectfully requested that this Court grant the Petition.

Respectfully submitted,

HOWARD BALDWIN
(*Counsel of Record*)
LAW OFFICE OF HOWARD BALDWIN
22 East University Boulevard
Tucson, Arizona 85705-7737
(520) 624-8527
Attorney for Petitioners

APPENDIX
TABLE OF CONTENTS

Page

Arizona Court of Appeals Memorandum Decision, February 23, 1999 .... App. 1

Arizona Court of Appeals Mandate, September 20, 1999 .... App. 12

Arizona Supreme Court denial of Petition for Review, August 30, 1999 .... App. 14

Superior Court Minute Entry and Judgment ... App. 16

AHCCCS Administrative Decision .... App. 20

Petitioner's Post-Hearing Memo before AHCCCS .... App. 32

U.S. Constitution, Article XIV .... App. 53

AAC R9-22-341 .... App. 54

42 CFR 431.201 .... App. 58

42 CFR 431.206 .... App. 59

42 CFR 431.210 .... App. 60

42 CFR 431.211 .... App. 61

42 CFR 431.230 .... App. 61

42 CFR 431.243 .... App. 62

42 CFR 435.902 .... App. 62

42 U.S.C. § 1396d(q) .... App. 63

42 CFR 435.102 .... App. 65

42 U.S.C. § 1396b(i) .... App. 66

42 U.S.C. § 1396a(a)(3) .... App. 67

P.L. 100-203 pp. 531-532 Legislative History, House of Representatives, No. 100-391(i) .... App. 68

APPENDIX
TABLE OF CONTENTS – Continued

Page
House Conf. Rep. No. 100-495 (Legislative History) ....App. 70
P.L. 99-272 Amending 42 U.S.C. § 1396b(i) ....App. 71
Petitioner's Opening Brief before Superior Court ....App. 72
Petitioner's Request for Review, Arizona Supreme Court ....App. 111

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic,

Plaintiffs-Appellees,

v.

JOHN KELLY, M.D. in his capacity as Director of Arizona Health Care Cost containment System; and THE STATE OF ARIZONA,

Defendants-Appellants.

1 CA-CV 98-0311

DEPARTMENT B

MEMORANDUM DECISION
(Not for Publication
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

(Filed Feb. 23, 1999)

Appeal from the Superior Court of Maricopa County

Cause No. CV 96-21041
The Honorable Michael J. O'Melia, Judge

REVERSED

Johnston & Dodd, P.L.C.
by Logan T. Johnston, III
Catherine M. Dodd
Anne C. Longo

Attorneys for Appellants Phoenix

Howard Baldwin
Attorney for Appellees Tucson

TOCI, Judge

Defendants Dr. John H. Kelly, in his capacity as Acting Director of Arizona Health Care Cost Containment System ("the director"), and the State of Arizona (collectively "AHCCCS") appeal the trial court's review of an administrative decision. AHCCCS claims that the trial court erred by reversing AHCCCS's denial of plaintiff Pima County's ("the County") request for reimbursement for organ transplant surgery expenses that the County incurred on behalf of plaintiffs Scott Bradley, Mary Bravo, and Robert Donaldson ("the patients"). For the reasons that follow, we reverse the judgment of the trial court.

I. BACKGROUND

This appeal involves two types of AHCCCS eligibility: categorical eligibility and medically needy/medically indigent ("MN/MI") eligibility. The categorically eligible include individuals who receive certain types of federal assistance, such as Supplemental Security Income ("SSI") AHCCCS is required by Medicaid to provide medical coverage to the categorically eligible. *See* Ariz. Rev. Stat. Ann. ("A.R.S.") § 36-2901(4)(b) (Supp. 1988); *Schweiker v. Hogan,* 457 U.S. 569, 571-72 (1982). AHCCCS has chosen to supplement its categorical coverage with the MN/MI coverage. *See* A.R.S. § 36-2901(4)(a), (c). *See also Schweiker,* 457 U.S. at 571-72 (states may choose to provide coverage to non-categorically eligible individuals). At the time of each patient's surgery, AHCCCS provided transplant coverage only to members who were categorically eligible. *See* A.R.S. 36-2907(A)(11) (1993).[1]

AHCCCS found that all of the patients were not categorically eligible at the time of each patient's surgery. Both Bradley and Donaldson were categorically eligible some time prior to surgery, but lost their eligibility because of changes in their status with the Social Security Administration. Bravo was never categorically eligible. All three patients were MN/MI eligible at the time of their surgeries. Because AHCCCS would not cover the patients' transplants, the County agreed to pay for the transplants, and the patients assigned their rights against AHCCCS to the County.

Notwithstanding the patients' AHCCCS eligibility status, the trial court held that AHCCCS was required to reimburse Pima County for all three transplants:

> The Court specifically finds that Bradley and Donaldson did not receive the JASSO notices and that they were categorically eligible at the time of the transplants. The Court further finds that the Plaintiff Bravo was similarly situated to the other persons who were eligible for transports [sic], and she should have been eligible, as well.

---

[1] Under A.R.S. 36-2907(A)(11) at that time, transplants were available only if "federal financial participation [was] available under title XIX of the social security act." Such federal funding only applies to the categorically eligible. Since that time, the state legislature has modified the statute to provide transplants for the MN/MI group, supported by funding from tobacco tax revenues. *See* A.R.S. § 36-3907(A)(11) & Historical and Statutory Notes (Supp. 1998).

This dispute does not arise out of the factual findings that supported the director's conclusion that the patients were not categorically eligible. The trial court agreed with the director's findings that JASSO notices were not sent to Bradley or Donaldson, that transplants were necessary to save the lives of all three patients, and that all three patients were MN/MI eligible. The trial court disagreed with the director's interpretation and application of the law to the facts. Thus, we apply a de novo standard of review. *See Arizona Healthcare Cost Containment Sys. Admin. v. Carondelet Health System*, 188 Ariz. 266, 269, 935 P.2d 844, 847 (App. 1996).

II. DISCUSSION

A. Bradley and Donaldson

The County argues that AHCCCS's failure to send JASSO notices to Bradley and Donaldson violated federal and state regulations, state statutory law, and Bradley's and Donaldson's due process rights. Because of these violations, the County claims, both Bradley and Donaldson lost their right to appeal AHCCCS's decision. Had Bradley and Donaldson been able to appeal, their categorical eligibility would have remained frozen until the decision was rendered. On appeal, they would have proven that they should remain categorically eligible as "qualified severely impaired" patients. Thus, the County reasons, Bradley and Donaldson should be deemed categorically eligible.

We agree that AHCCCS erred by failing to send the JASSO notices. We do not agree, however, that the proper remedy for such an error is to deem Bradley and Donaldson categorically eligible. First, the County presented no evidence that either Bradley or Donaldson would have appealed as a result of receiving the JASSO notice. Second, the County cites *Granato v. Bane,* 74 F.3d 406, 409 (2nd Cir. 1996), for the proposition that a timely appeal would have required AHCCCS to continue the patients' benefits until a resolution of the appeal. Nevertheless, the County does not claim, and the evidence does not show, that had Bradley and Donaldson appealed, they would have received their transplants while their categorical eligibility status continued pending a hearing decision. Finally, the County failed to prove a causal relationship between AHCCCS's failure to send JASSO notices and Bradley's and Donaldson's inability to remain eligible as "qualified severely impaired" individuals.

Had Bradley and Donaldson received their JASSO notices and appealed AHCCCS's decision on the theory that they were "qualified severely impaired," AHCCCS would not have been able to make this determination. Federal law requires states to provide categorical eligibility to individuals who "are qualified severely impaired individuals" as defined by the Social Security Act ("SSA"). 42 U.S.C.S. § 1396a(a)(10)(A)(i)(II) (Supp. 1998). At the time of the transplants, the SSA's definition of a "qualified severely impaired individual" provided that the "Secretary" had to make specific determinations regarding the individual's impairment, earnings, and employability. 42 U.S.C.S. § 1396d(q)(2) (1993).[2] SSA did not specify whether the term "Secretary" referred to the Secretary of the Social Security Administration or the Secretary of the Department of Health and Human Services. AHCCCS and the County agree, however, that "Secretary" did not refer to any state position. Furthermore, nothing in either state or federal law required or allowed the state to make these determinations assigned to the Secretary by the SSA.

---

[2] The statute has been amended to provide that the "Commissioner of Social Security" must now make such determinations. U.S.C.S. § 1396d(q)(2) (Supp. 1998).

The County cites *Crippen v. Kheder,* 741 F.2d 102 (6th Cir. 1984), for the proposition that AHCCCS had a duty to determine Bradley's and Donaldson's eligibility independent of their eligibility for SSI benefits. *Crippen,* however, requires a state to determine whether a patient who is losing categorical eligibility could remain eligible under the state's medically needy plan. *See id.* at 106-07. Categorical eligibility requires a *federal* determination (such as qualification for SSI, AFDC, or benefits as a qualified severely impaired individual). AHCCCS cannot continue a patient's categorical eligibility status absent a federal basis for doing so. Therefore, *Crippen* does not apply.

Additionally, after the County interceded to seek reimbursement from AHCCCS, the County failed to establish in its Post Hearing Memoranda that Bradley and Donaldson were qualified severely impaired. Thus, even if AHCCCS were legally required to determine whether these patients were qualified severely impaired, the County did not provide the hearing officer with any facts to assist the officer in its decision.

Even now, the County has not cited any facts from the record to support is assertion that Bradley and Donaldson satisfy the requirements for the findings that are to be made by the Secretary. We therefore conclude that Bradley and Donaldson would not have been able to establish that they were categorically eligible as qualified severely impaired individuals even if they had received the JASSO notices.

The "qualified severely impaired" theory is the only means by which the County claims that Bradley and Donaldson could have proven that categorical eligibility if they had received their JASSO notices. Thus, we conclude that AHCCCS's failure to send notices has no bearing on these patients' eligibility status.

B. Bravo

The County claims that Bravo should be deemed eligible for her transplant because she was "similarly situated" to categorically eligible persons who need transplants. The County supports its claim with 42 U.S.C.S. § 1396b(i) (1993), which mandates that a state choosing to fund organ transplants must create "written standards respecting the coverage of such procedures." These standards must provide that "similarly situated individuals are treated alike." *Id.* The County cites federal and Arizona case law, which defines "similarly situated" as "all patients who can be treated effectively by the same organ transplant procedure." *See Dexter v. Kirschner*, 984 F.2d 979, 986 (9th Cir. 1992); *Salgado v. Kirschner*, 179 Ariz. 301, 306, 878 P.2d 659, 664 (1994). Because Bravo falls "within the class of persons who could be effectively treated with a heart transplant," the County argues, AHCCCS must cover Bravo's heart transplant. We disagree.

The "similarly situated" provision does not require that patients who are covered under a state's supplemental plan (such as MN/MI) be provided the same coverage as patients who are categorically eligible. The very fact that a patient falls under a state's supplemental coverage makes that patient's situation *dissimilar* to that of a categorically eligible patients. Holding otherwise would run contrary to the explicit federal provision that a state may choose to cover only categorically eligible patients while providing no coverage to anyone else. As the United States Supreme Court explained:

> In choosing to require coverage only for the categorically needy, Congress permitted States to exclude from the program many persons who – by reason of large medical expenses – often were just as much in need of medical assistance as the categorically needy.
>
> . . . .
>
> . . . If a State may deny all benefits to the medically needy – while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not – a State surely may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance.

Schweiker, 457 U.S. at 590, 592. Although the Supreme Court was not referring specifically to transplant coverage benefits, the underlying rationale still applies in this case. In light of the above, we find that the trial court erred by finding Bravo similarly situated to categorically eligible patients.

C. The County's "Cross Issues"

The County raises seven additional legal theories that the County claims would support the trial judge's conclusion if we find his reasoning incorrect. Two of these theories were not raised at the administrative level, and we therefore do not address them here. *See Richter v. Dairy Queen,* 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982). We addressed one of the theories, that Bradley and Donaldson were qualified severely impaired, in our JASSO notice discussion above. In light of our discussion below, we need not discuss the County's "emergency services" theory. Because we may affirm the trial court's decision for reasons other than those used by the trial court, *see State v. Oakley,* 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994), we briefly address the County's remaining theories below and find that none of them support the trial court's decision.

First, the County claims that because Bradley and Donaldson were in need of transplants during the time they were categorically eligible, they should have been deemed to remain eligible until actually receiving those transplants. To support its claim, the County cites to a discussion in Senate Bill 1001, 42nd Legislature, 3rd Special Session (Ariz. 1995), regarding the need to extend transplant coverage for patients beyond the date at which categorical eligibility ends. The legislation that resulted from this bill, however, was not effective until after Bradley's and Donaldson's transplants. Thus, this bill does not apply. The County cites no other legal authority that would have required AHCCCS to extend eligibility for transplants beyond the termination of categorical eligibility.

Second, the County claims that using categorical eligibility as the standard for providing transplants is "unreasonable, arbitrary, and capricious" and is therefore invalid. As discussed in the section on "similarly situated" patients above, however, the federal law expressly allows states to provide less coverage for patients who are not categorically eligible. The U.S. Supreme Court has held that such distinctions are not arbitrary because the categorically eligible are the "most needy" individuals in the country. *See Schweiker,* 457 U.S. at 590-91.

Finally, the County claims that providing transplant coverage for the categorically eligible, and not the MN/MI eligible, violates the privileges and immunities provision of the Arizona Constitution and the equal protection clause of the U.S. Constitution. Because this claim is based on neither a suspect class nor a fundamental right, the County must show that no rational basis exists for the distinction. *See Big D. Constr. Corp. v. Court of Appeals,* 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990). A desire by the legislature to conserve limited public resources may constitute a rational basis. *See Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 814 (1976). Here, the distinction that had been made by the legislature to fund transplants only for categorically eligible patients was a rational method for conserving the state's resources.

III. CONCLUSION

For the reasons explained above, we reverse the decision of the trial court.

/s/ Philip E. Toci
PHILIP E. TOCI, Judge

CONCURRING:

/s/ Jon W. Thompson
JON W. THOMPSON, Presiding Judge

/s/ Sarah D. Grant
SARAH D. GRANT, Judge

IN THE
Court of Appeals
STATE OF ARIZONA
DIVISION ONE

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic, Plaintiffs-Appellees, v. JOHN KELLY, M.D. in his capacity as Director of Arizona Health Care Cost Containment System; and THE STATE OF ARIZONA, Defendants-Appellants.	1 CA-CV 98-0311 **DEPARTMENT B**

MANDATE

TO: The Honorable Superior Court for MARICOPA County, Arizona in relation to Cause No. CV 96-21041.

GREETING: The above cause was presented in your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This Court rendered its memorandum decision and caused the same to be filed on February 23, 1999.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated

August 30, 1999, the Arizona Supreme Court denied the petition for review, Supreme Court No. CV-99-0131-PR.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the decision of this Court, a copy of the memorandum decision being attached hereto.

WITNESS, THE HONORABLE JON W. THOMPSON, Presiding Judge, Department B, Division One of the Court of Appeals of the State of Arizona on September 20, 1999.

(SEAL)

GLEN D. CLARK, CLERK
By

/s/ Leeann Williams
Deputy Clerk

IT IS ORDERED that the original of the foregoing MANDATE and a copy of the memorandum decision of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona on September 20, 1999. A copy of MANDATE and memorandum decision was mailed to The Honorable Michael J. O'Melia, Judge, and a copy of the MANDATE was mailed on said day to each party appearing or the attorneys of record.

GLEN D. CLARK, CLERK
By

/s/ Leeann Williams
Deputy Clerk

[LOGO]

Supreme Court

STATE OF ARIZONA

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 542-9396

August 31, 1999

RE: SCOTT BRADLEY/MARY BRAVO/ROBERT DONALDSON/PIMA COUNTY, AZ vs. JOHN KELLY/STATE OF ARIZONA
Supreme Court No. CV-99-0131-PR
Court of Appeals No. 1 CA-CV 98-0311
Maricopa County No. CV-96-21041

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 30, 1999, in regard to the above-referenced cause:

ORDERED: Appellees' Petition for **Review = DENIED.**

FURTHER ORDERED: Request for Attorneys' Fees [Appellees Bradley et al] = DENIED.

A panel composed of Chief Justice Zlaket, Justice Feldman, and Justice McGregor participated in the determination of this matter.

Record returned to Court of Appeals, Division One, Phoenix, this 31st day of August, 1999.

NOEL K. DESSAINT, Clerk

TO:

Howard Baldwin, Esq.
Johnston and Dodd PLC – Attn: Logan T. Johnston, Esq., Catherine M. Dodd, Esq., and Anne C. Longo, Esq.
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix Lexis-Nexis
West Publishing Company

cnc

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT
HON. MICHAEL J. O'MELIA
October 3, 1997 A. Beery
Deputy

No CV 96-21041

FILED: OCT 6 1997

SCOTT BRADLEY, et al.	Howard Baldwin #003330
v.	
JOHN H. KELLY, et al.	Michael D. Curran #012677

After considering the briefs that have been submitted and the arguments of counsel, the Court finds in favor of the Plaintiffs. The action of the director of AHCCCS was invalid, and his decision is set aside. The Court specifically finds that Bradley and Donaldson did not receive the JASSO notices and that they were categorically eligible at the time of the transplants. The Court further finds that the Plaintiff Bravo was similarly situated to other persons who were eligible for transports, and she should have been eligible, as well.

IT IS THEREFORE ORDERED vacating the administrative decision and finding for the Plaintiffs.

The Court apologizes to counsel, as this matter was ruled upon on July 11th of this year, but for some reason, the minute entry was never sent out or transcribed.

Howard Baldwin

Attorney for Plaintiff

22 East University Boulevard

Tucson, Arizona 85705-7737

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic, Plaintiffs vs. JOHN H. KELLY, M.D. in his capacity as Director of Arizona Health Care Cost Containment System; and THE STATE OF ARIZONA, Defendants.	Case No. CV 96-21041 JUDGMENT (Filed March 27, 1998) (Judge Michael J. O'Melia)

This matter having come before this Court as a Complaint for Review of Administrative Decision, the parties having presented briefs and oral argument to the Court, the Court having considered the record of the administrative hearing, the briefs and argument, did render its decision vacating the administrative decision, the Plaintiffs having made application for attorney fees and costs, the Court having considered said application and the opposition thereto, the arguments of counsel and memoranda, denied said application, this matter being fully adjudicated and the Plaintiffs now being entitled to the relief requested before the administrative agency, there being no just cause for delay:

THE COURT FINDS:

After considering the briefs that have been submitted and the arguments of counsel, the court finds in favor of the Plaintiffs. The action of the director of AHCCCS was invalid, and his decision is set aside. The Court specifically finds that Bradley and Donaldson did not receive the JASSO notices and that they were categorically eligible at the time of the transplants. The Court further finds that the Plaintiff Bravo was similarly, situated to other persons who were eligible for transplants, and she should have been eligible, as well.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That the final decision of the Director of AHCCCS in this matter was invalid in that it was not supported by the evidence, was contrary to law, and said decision is therefore reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

That Plaintiff Pima County, Arizona, shall have judgment against the Arizona Health Care Cost Containment System and the State of Arizona as follows:

For Scott Bradley's heart transplant costs:	$ 91,752.05

For Mary Bravo's heart transplant costs:	68,939.66
For Robert Donaldson's liver transplant costs:	158,615.89
Total:	$319,280.60

IT IS FURTHER ORDERED:

That the foregoing amounts shall bear interest at the legal rate from the date of the administrative hearing (April 2, 1996) until paid.

DONE this 27 day of March, 1998.

/s/ Michael J. O'Melia
MICHAEL J. O'MELIA, JUDGE
OF THE SUPERIOR COURT

[LOGO]
AHCCCS
Arizona Health Care
Containment System

Fife Symington
Governor

John H. Kelly
Acting Director

BEFORE THE DIRECTOR OF THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

In the Matter of:	)	Grievance No.
	)	P060995-04
Pima County	)	P060995-05
(Re: Mary Bravo,	)	P060995-07
A14-78-0300	)	
Scott Bradley,	)	
A11-88-0222	)	DECISION
Robert Donaldson,	)	
A13-39-3553)	)	
	)	
Grievant,	)	
	)	
vs.	)	
	)	
Arizona Health Care	)	
Cost Containment	)	
System,	)	
	)	
Respondent.	)	
	)	
AHCCCS GRIEVANCE	)	
HEARING	)	
______________________	)	

PURSUANT TO the authority granted to me by A.R.S. § 36-2903.01(B) (4) and Title 9, Chapter 22, Article 8 of the Arizona Administrative Code, and in consideration of the record in the above matter, I hereby make the following Decision and Order:

IT IS ORDERED that the findings of fact, conclusions of law and recommended decision dated June 5, 1996, by the AHCCCS Hearing Officer in this matter, are supported by substantial evidence, are adopted as part of this Decision, are incorporated herein by reference as though fully set forth verbatim and are attached hereto.

IT IS FURTHER ORDERED that this Appeal is denied. Appellant is denied reimbursement for the heart or liver transplants provided each of the patients herein.

FINDINGS OF FACT

SCOTT BRADLEY

1. Scott Bradley, an individual diagnosed with idiopathic cardiomyopathy, a terminal heart condition, became Aid to Families with Dependent Children ("AFDC") categorically eligible for AHCCCS benefits effective March 1, 1993.

2. Mr. Bradley was found eligible for Social Security Income ("SSI") benefits in August 1993, retroactive to March 1993. Thereafter, he was found disabled and entitled to Social Security Disability ("SSD") payments as of August 1993.

3. As a result of Mr. Bradley's having been found SSD eligible in August 1993, he was found income ineligible for SSI and AFDC, from which programs he was terminated as of August 1993. As a consequence, Scott Bradley's categorical eligibility under Title 19 for AHCCCS coverage was also terminated.

4. Scott Bradley became eligible for the Arizona State AHCCCS Medically Indigent/Medically Needy ("MI/MN") program, subsequent to the loss of his categorical eligibility under Title 19. He retained his MI/MN eligibility at the time of his heart transplant on January 24, 1995.

5. Although Mr. Bradley applied for transplant coverage from his AHCCCS contract provider, he was denied such coverage on the basis that he was not categorically eligible for benefits under Title 19.

6. Subsequent to June 7, 1994, the Pima County Board of Supervisors instituted a policy of providing coverage for medically necessary transplants for persons in Mr. Bradley's situation. Mr. Bradley's application to Pima County for a transplant was approved on May 23, 1994.

7. Pima County paid $89,152.05 for the medical services necessary to Mr. Bradley's transplant as well as a claim for $2,600.00 for administrative costs.

ROBERT DONALDSON

8. Robert Donaldson was diagnosed with a liver disease in September 1993, which disease required a liver transplant.

9. Patient Donaldson was determined eligible for the MI/MN program in September 1993 and became categorically eligible under Title 19 in May 1994.

10. Mr. Donaldson became eligible for SSD payments beginning November 1, 1994, upon which eligibility he lost his categorical eligibility for AHCCCS benefits.

11. Having been denied coverage for a liver transplant by Mr. Donaldson's AHCCCS contract provider, on two (2) occasions, Pima County authorized coverage for the medically necessary liver transplant, which occurred on January 24, 1995.

12. Pima County incurred medical expenses in the sum of $155,365.89, together with a claimed $3,250.00 in administrative costs.

MARY BRAVO

13. Mary Bravo was diagnosed with idiopathic cardiomyopathy, necessitating a heart transplant to save her life.

14. Although, on May 25, 1994, patient Bravo was eligible for the State MI/MN program and was, in fact, a member of an AHCCCS contracted health plan, Ms. Bravo was declared ineligible for a heart transplant as she was not categorically eligible under Title 19.

15. On June 21, 1994, Pima County, through its Board of Supervisors, approved Mary Bravo for a County financed heart transplant.

16. Ms. Bravo was provided a heart transplant on November 23, 1994. The patient had lost her MI/MN AHCCCS eligibility, prior to that time, as she had applied for and been approved for SSD benefits.

17. Pima County incurred expenses in the amount of $65,439.66 for the medical services necessary to Ms. Bravo's transplant, along with claimed administrative costs in the amount of $3,500.00.

18. It is undisputed that each of the patients herein would have been eligible for transplant services under the AHCCCS program had they been categorically eligible at the time of their transplants. All three (3) patients were MI/MN eligible, but at the time of their transplants, Mary Bravo and Robert Donaldson were MI/MN eligible for emergency services only.

REASONING AND CONCLUSIONS OF LAW

1. At the time of each of the surgeries herein, transplants were covered only for those people who were categorically eligible.[1]

2. The AHCCCS Administration and its contractors were prohibited from providing services or becoming liable for services provided, "if federal monies are unavailable." A.R.S. § 36-2919. The corresponding federal authority for the payment of federal monies is derived from 42 U.S.C. 1396b(i).

3. Although a state is not required to cover organ transplants, should a state choose to do so it may not arbitrarily or unreasonably deny services to an otherwise eligible medical recipient. *Dexter v. Kirschner*, 972 F.2d 1113, 1117 (9th cir. 1992); *see also Alice V. Patterson*, 859 F.2d 52, 55 (8th cir. 1988). Section 1396b(i) provides, in pertinent part, that "similarly situated individuals under the law must be treated alike. . . . " "Similarly situated" within the meaning of that section has been interpreted to

---

[1] Under current law, transplants are covered for all AHCCS eligible persons without regard to whether those persons are MI/MN or categorically eligible.

mean, "all patients who can be treated effectively by the same organ transplant procedure." *Dexter* 972 F.2d at 1120. The Director hereby determines that Respondent's action in this matter failed to violate that regulatory provision.

4. The Arizona Supreme Court acknowledged that Arizona would not (and, impliedly, was not required to) cover transplants unless the federal share of such costs was paid by the federal government. *Salgado v. Kirschner,* 179 Ariz. 301, 306, 878 P.2d 659 (1994). The Court noted that "it is axiomatic that Arizona would not cover transplants if the federal share would not be paid under Section 1396b(i)." Here, the federal government was not required to pay a share for the provision of each of these transplants as neither of the patients were categorically eligible. Evidence adduced at the hearing evinces that Appellant County was well aware at the time that it agreed to fund the transplants that no AHCCCS coverage would be available if the party was not categorically eligible at the time of the transplant.

5. Under the then current law, Arizona's restriction of transplant services to categorically eligible persons was neither arbitrary and capricious nor prohibited by statute or other legal provision. Appellant County may not now argue that the State's policy, of which it was aware at the time that it gave authorization for the provision of the transplants, was unreasonable.

6. Accordingly, this Appeal is denied.

PURSUANT TO Title 9, Chapter 22, Article 8 of the Arizona Administrative Code, a Petition for Rehearing in this matter may be filed with the AHCCCS Administration and must be received no later than fifteen (15) days from the date of this Director's Decision.

/s/ John H. Kelly
John H. Kelly
Acting Director
AHCCCSA

Copies sent by certified mail this 27
day of June, 1996 to:

Howard Baldwin
Attorney at Law
22 East University Boulevard
Tucson, Arizona 85705-7737

Mike Curran
Attorney at Law
Johnston Maynard Grant and Parker
3200 North Central Avenue,
Suite 2300
Phoenix, Arizona 85012

[LOGO]

AHCCCS

Fife Symington
Governor

Arizona Health Care Cost Containment System

John H. Kelly
Action Director

BEFORE THE DIRECTOR OF THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

In the Matter of:	Grievance No.
Pima County (Re: Mary Bravo, A14-78-0300 Scott Bradley, A11-88-0222 Robert Donaldson, A13-39-3553)	P060995-04 P060995-05 P060995-07
Grievant,	FINAL DECISION
vs.	
Arizona Health Care Cost Containment System, Respondent.	
AHCCCS GRIEVANCE HEARING	

PURSUANT TO the authority granted to me by A.R.S. § 36-3903.01(B)(4) and Title 9, Chapter 22, Article 8 of the Arizona Administrative Code and in consideration of the record in the above matter, I hereby make the following Final Decision and Order:

1. On July 12, 1996, Appellant submitted its Petition for Rehearing and Review of the Director's Decision issued on June 28, 196. Petitioner has failed to establish any one of the following causes enumerated in Title 9, Chapter 22, Article 8 of the Arizona Administrative Code necessary to sustain a Petition for Rehearing or Review: irregularity in the proceedings of the hearing or appeal which deprived Petitioner of a fair hearing or appeal; misconduct of a party or agency; newly discovered material evidence which could not have been discovered and proved at the hearing; that the Decision is the result of passion or prejudice or that the Decision is not justified by the evidence or its contrary to law.

2. The Director's Decision is justified and supported by substantial evidence and is not contrary to law.

3. In its Petition, Appellant enumerates and reiterates each of the alleged causes of action upon which its original grievance was based. Each of the subjects upon which appellant now relies for rehearing was treated individually and exhaustively in the Recommended Decision and the Decision which Appellant questions. Each and all of the seven (7) alleged causes of action were supported by substantial evidence and the conclusions in each case are not contrary to law as it existed at the time of the transplants which were the subject of the original grievances.

4. Appellant also maintains that there was no evidence presented that the federal government would not pay a share of the transplant cost. However, as is pointed out in the Recommended Decision, the Arizona Supreme Court has acknowledged the right of a state to cover

transplants only if federal money was available. (Recommended Decision, page 17). The Arizona State Plan (which was approved by HCFA) at all times relevant to these cases supported the exclusion of a transplant coverage for individuals who were not categorically eligible. It is also noted that 42 U.S.C. 1396b(i), upon which appellant relies, advances criteria which apply to *categorically eligible* individuals under Title XIX. There is no federal mandate which requires states to cover non-categorically eligible persons for transplant services.

5. Appellant also protests that the conclusion in the Recommended Decision that, "evidence confirms that the SSI eligibility was never conveyed to AHCCCS by the Social Security Administration" was not supported by competent evidence. However, witness Michelle Castiglione gave unopposed testimony that the SSI eligibility was not conveyed to AHCCCS. Thus, contrary to Appellant's position, the statement was supported by competent evidence and was not rebutted.

6. Appellant also maintains that the Recommended Decision and the Decision erred in the conclusion that, "neither Bradley nor Donaldson could have obtained categorical eligibility under a different classification, even if they had been provided notice." But, as is pointed out in the Recommended Decision, no evidence was presented from which to conclude that either Mr. Bradley or Mr. Donaldson would have obtained classification as qualified severely impaired individuals because they were never certified as such under the terms of 42 U.S.C. 1396d(q). As is pointed out in the Recommended Decision, the statute requires that the determination of that status must be made by the "secretary." Thus, by specific

statutory expression, the determination as to whether an individual can be so categorized must rest with a federal entity and not with Respondent.

7. The other arguments advanced by Appellant in its Petition are equally inefficacious. A review of the Recommended Decision and of the evidence confirms that the conclusions which were arrived at in reliance upon the facts and evidence presented are not erroneous. Rather, it is confirmed that the Director's Decision is justified and supported by substantial evidence and is not contrary to law. Accordingly, the Petition for Review is denied and the Director's Decision is sustained.

IT IS ORDERED that the findings of fact, conclusions of law and Director's Decision dated June 28, 1996 in this matter are supported by substantial evidence and are therefore adopted as part of this final Decision.

PURSUANT TO the requirements of A.R.S. § 36-2903.01(B)(4), this Final Decision is a final administrative decision and is subject to judicial review in accordance with A.R.S. § 12-901 *et seq*.

/s/ John H. Kelly
John H. Kelly
Acting Director AHCCCSA

Copy sent by certified mail
this 19th day of September, 1996 to:

Howard Baldwin
Attorney at Law
22 East University Boulevard
Tucson, Arizona 85705-7737

Mike Curran
Attorney at Law
Johnston Maynard Grant and Parker
3200 North Central Avenue, Suite 2300
Phoenix, Arizona 85012

Howard Baldwin
Attorney for Pima County, et al.
22 E. University Blvd
Tucson, AZ 85705-7737

BEFORE THE ARIZONA HEALTH CARE
COST CONTAINMENT SYSTEM
HEARING DIVISION

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; and PIMA COUNTY, ARIZONA. vs. MABEL CHEN, in her capacity as Director of Arizona Health Care Cost Containment System.	POST HEARING MEMORANDA (Case Numbers: P060995-4, Bravo; P060995-05, Bradley; P060995-07, Donaldson.)

INTRODUCTION

These are three separate cases which were combined for hearing because each person was denied coverage for an organ transplant by AHCCCS. While the denial of organ transplant coverage is the common link, each of these matters have a differing factual basis and each must be evaluated in light of the law which is applicable to the individual fact situation.

As will be pointed out in this memorandum, SCOTT BRADLEY and ROBERT DONALDSON should have been considered categorically eligible at the time of their transplants because AHCCCS failed to follow its own regulations and statutes concerning loss of categorical status.

Secondly, AHCCCS failed to advise or provide a mechanism for either of those persons to remain on categorical status as a "qualified severely impaired individual". As a result, AHCCCS violated its State Plan and the federal statutes and regulations pertaining to Medicaid. Thus, there are two legal grounds upon which SCOTT BRADLEY and ROBERT DONALDSON should have continued to be categorically eligible and their transplants should have been covered that do not apply to MARY BRAVO.

In addition to the foregoing, there are multiple legal grounds to establish AHCCCS's liability to cover the BRADLEY, BRAVO, and DONALDSON transplants. It is indisputable that SCOTT BRADLEY was eligible on the basis of being medically needy/medically indigent (MN/MI). AHCCCS apparently disputes the status of BRAVO and DONALDSON as being only eligible for emergency services. This contention will later be dealt with. Assuming that all three were MN/MI eligible at the time of their transplants, AHCCCS violates the federal statutes and regulations and the precedent set in the *Salgado* decision by denying them the same coverage as it allows for categorically eligible persons. These persons are "similarly situated" to those categorically eligible persons who need transplants.

The denials of these three transplants is also unconstitutional. If AHCCCS is allowed to provide coverage to one class of persons who need transplants because they are categorically eligible, and to deny transplants to another class merely because they are MN/MI eligible, the privileges and immunity clause of the Arizona Constitution and the equal protection clause of the Fourteenth amendment to the U.S. Constitution are violated.

The determination by AHCCCS that ROBERT DONALDSON and MARY BRAVO were only eligible for "emergency" services, which does not cover organ transplants, is based upon an erroneous assumption that the eligibility cannot begin at the actual time the expense is incurred (i.e., eligibility begins while on the operating table). There is no regulation with such a requirement and to the extent it is based upon policy, such policy is arbitrary and capricious.

Moreover, it can reasonably be concluded that transplant operations may be deemed to be emergency procedures because of the inherent nature of the process.

All of the foregoing will be covered in detail in the discussions to follow concerning each transplant recipient.

II. THE FACTS

A. Scott Bradley:

The facts adduced at the April 2, 1996 hearing on this matter establishes the following:

On February 15, 1993, SCOTT BRADLEY, born June 7, 1952, then age 40, was diagnosed as having a terminal heart condition known as idiopathic cardiomyopathy, thought to have been caused by a viral infection. His condition was so severe that only a heart transplant would sustain his life.

He had been a wage earner for approximately 25 years at the onset of his illness. He also was married, had a two year old son and his wife was expecting a child.

SCOTT BRADLEY could no longer work, and he and his family became eligible for Aid to Families with Dependent Children (AFDC). Also, as a result of receiving the AFDC, he became categorically or mandatorily eligible for AHCCCS coverage effective March 1, 1993.

Because he was receiving AFDC, SCOTT BRADLEY was required by the Arizona Department of Economic Security (DES) to make application for Supplemental Security Income (SSI) or Social Security Disability (SSD).

In August 1993, he was found eligible for SSI payments retroactive as of March 1993. At the same time, for purposes of SSD, he was determined to be disabled and unable to work as of February 14, 1993. His entitlement for SSD began as of August 1993 and he could not refuse to accept the payment in order to maintain his eligibility for AFDC or SSI.

His monthly income from SSD, based upon his previous payments into Social Security, was $701.00 per month. This resulted in his eligibility for SSI and AFDC being terminated as of August 1993 because the payments received from SSD caused him to be over the allowable income limits. As a result, he also lost his categorical/mandatory eligibility status for AHCCCS coverage. He had no other income.

AHCCCS was required by its regulations, the State Plan, and federal law to notify SCOTT BRADLEY in writing of his loss of categorical eligibility (A.A.C.

R9-22-341) and it failed to do so. AHCCCS also failed to notify SCOTT BRADLEY of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual".

In spite of the foregoing, SCOTT BRADLEY applied for AHCCCS coverage as an MN/MI person. By "spending down", SCOTT BRADLEY was able to attain his eligibility for AHCCCS as a medically needy/medically indigent (MN/MI) person and he was so eligible when he received his heart transplant on January 24, 1995.

Between December 1993 and February 1994, he applied for and was denied transplant coverage by his AHCCCS provider, Pima Health System, on the basis he was not categorically eligible. He appealed the decision of Pima Health System and also reapplied for AFDC coverage, was denied, and appealed that decision. Both appeals were denied.

During the same time period, inquiry was made of AHCCCS representatives by Michael Callahan of the Pima County Attorney's Office, for a determination to be made whether SCOTT BRADLEY was a qualified severely impaired individual. The AHCCCS representatives stated that they had no mechanism to make such a determination.

On March 22, 1994, the Pima County Board of Supervisors adopted a policy to give coverage to persons in Mr. Bradley's situation for a heart transplant, providing he was otherwise AHCCCS eligible at the time of the transplant. The policy was later amended on June 7, 1994.

The heart transplant was medically necessary and the only appropriate medical procedure available to sustain SCOTT BRADLEY'S life. The Pima County Medical Review Board found the transplant to be medically necessary and approved the application for a transplant on May 23, 1994. SCOTT BRADLEY received a heart transplant at University Medical Center on January 24, 1995.

Pima County paid the amount of $89,152.05 for the medical services necessary for SCOTT BRADLEY'S transplant, which was discounted from the billed charges which were $138,406.13. Pima County also incurred $2,600.00 for administrative costs.

SCOTT BRADLEY assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS to Pima County on November 4, 1994. A Demand was made May 1, 1995 upon the Director of AHCCCS.

B. Robert Donaldson:

The facts presented at the hearing establish the following concerning ROBERT DONALDSON:

ROBERT DONALDSON was born December 21, 1956. At the time of the liver transplant, he was a 38 year old divorced person, parent of three children. He was diagnosed as having a fatal liver disease in September, 1993.

ROBERT DONALDSON had worked most of his adult life and prior to his illness. He was employed as a maintenance technician for an automobile rental agency. He became unable to work because of his liver disease in approximately September 1993.

He first became AHCCCS eligible September 1, 1993 as an MN/MI. He became categorically/mandatorily eligible when he became eligible for SSI payments on May 1, 1994.

As a result of receiving SSD, he became ineligible beginning November 1, 1994 for categorical coverage. He had no other income.

AHCCCS was required by its regulations, the State Plan, and federal law to notify ROBERT DONALDSON in writing of his loss of categorical eligibility (A.A.C. R9-22-341) and it failed to do so. AHCCCS also failed to notify him of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual".

In spite of the foregoing, ROBERT DONALDSON reapplied as an MN/MI and as a result of spendown [sic] which occurred on January 24, 1995, he was again MN/MI eligible as of January 24, 1995.

ROBERT DONALDSON and his physician, Lane Johnson, M.D., first requested a transplant in May 1994, and as denied by his AHCCCS provider, University Famli-Care on May 5, 1994, which was erroneous because he was in fact categorically eligible at the time. His second request for a liver transplant was denied by his subsequent AHCCCS provider, Cigna Community Choice, on February 10, 1995, because he was not categorically eligible.

Pima County, under its Liver Transplant Policy established for Elizabeth Salgado, approved payment up to its contracted amount for a liver transplant provided DONALDSON remained AHCCCS eligible and the transplant was approved by the Pima County Medical Review Board.

The Pima County Medical Review board approved ROBERT DONALDSON as an appropriate liver transplant candidate on August 15, 1994. Pima County authorized coverage for a liver transplant on August 16, 1994 during which time he was also categorically eligible. The liver transplant was medically appropriate, medically necessary, and the only medical procedure available to sustain ROBERT DONALDSON's life.

ROBERT DONALDSON received his liver transplant at Good Samaritan Regional Medical Center on January 24, 1995. The total amount of billed charges for ROBERT DONALDSON's liver transplant and related care were $704,686.67, but due to Pima County's contract with the provider, a maximum cost had been agreed upon. Pima County paid the amount of $155,365.89 for the liver transplant and the medical costs associated with ROBERT DONALDSON's liver transplant for the period that he was MN/MI eligible but not categorically eligible. Pima County also incurred $3,250.00 in administrative costs.

ROBERT DONALDSON would have been eligible for AHCCCS coverage based upon the *Salgado* decision, had he remained categorically eligible as of the transplant date.

ROBERT DONALDSON assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS, to Pima County on May 30, 1995. He had no income except SSD.

C. Mary Bravo:

The facts at the April 2, 1996 hearing related to MARY BRAVO establish the following:

MARY BRAVO, a married woman, was born July 2, 1935, and was found to be disabled for purposes of Social Security Disability payments retroactive to February 2, 1993. Prior to that time, she had worked as a club manager for American Legion.

She was diagnosed in February 1993 as having idiopathic cardiomyopathy, and since that time had multiple hospitalizations for congestive heart failure. On April 7, 1994, MARY BRAVO's attending physician recommended cardiac transplantation.

On May 25, 1994, her AHCCCS provider, Health Choice Plan, denied coverage on the basis that she was not categorically eligible.

On June 21, 1994, the Pima County Board of Supervisors voted to cover the costs of MARY BRAVO's heart transplant under its transplant policies which required that she be AHCCCS eligible at the time of the transplant and her transplant be approved by the Pima County Medical Review Board.

On August 15, 1994, the Pima County Medical Review Board found MARY BRAVO to be an appropriate candidate for a heart transplant. A heart transplant was medically necessary and the only appropriate medical procedure to sustain MARY BRAVO's life. She received a heart transplant at University Medical Center on November 23, 1994 and again became MN/MI AHCCCS eligible at the time.

MARY BRAVO originally became eligible for MN/MI AHCCCS status January 1994. MARY BRAVO had applied for SSI benefits, but was determined not to be eligible because of family income. She was determined to be eligible for SSD because she was a wage earner. After receiving the SSD benefits, she became ineligible, but further medical expenses made her MN/MI eligible again at the time of the transplant as a result of spending down. She would have been eligible for a heart transplant had she been categorically eligible at the time of her heart transplant.

Pima County paid the amount of $65,439.66 for the medical services necessary for MARY BRAVO's transplant which was discounted from the billed charges which were $122,213.95. Pima County also incurred administrative costs in the amount of $3,500.00.

MARY BRAVO assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS to Pima County on February 17, 1995. A demand for payment was made by Pima County to Mabel Chem [sic], Director of AHCCCS, on May 31, 1995.

D. Facts Common to All Three Cases:

SCOTT BRADLEY, ROBERT DONALDSON, and MARY BRAVO were all recipients of SSD at the time of their transplants. Persons who are eligible for SSD are also eligible for Medicare which would cover the transplants. However, Medicare does not become effective until the expiration of two years from the initial receipt of SSD.

A person is determined to be eligible for SSD based upon past earnings of wages. The amount of past wages also determines the amount of SSD that will be paid.

SCOTT BRADLEY, ROBERT DONALDSON, and MARY BRAVO could not refuse the SSD in order to continue to receive SSI or to establish or preserve their status of being categorically eligible for Medicaid.

It is undisputed that if any of the parties here were considered to be categorically eligible at the time of their transplants, they would be covered by AHCCCS.

III. THE LAW

There are multiple grounds for determining that AHCCCS should be responsible for coverage of these transplant cases. Some grounds apply only to BRADLEY and DONALDSON, and others apply to all three parties. The former shall be first discussed.

A. Bradley and Donaldson Should Be Determined to Have Been Categorically Eligible At the Time of Their Transplants.

In both cases, AHCCCS failed to provide notice of termination, to advise of a right to appeal, and to advise of a right to a determination that each were qualified severely handicapped individuals. This was a direct violation of R9-22-341. More importantly, it was also a violation of State Plan and federal statutes and regulations. 42 U.S.C. § 1396a(a)(3) specifically requires the state Plan and AHCCCS to provide hearings when benefits are terminated. 42 C.F.R. § 431.201, and see *Massachusetts Ass'n.*

of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983); *Haymons v. Williams*, 795 F.Supp. 1511 (M.D. Fla. 1992).

The status of Medicaid categorical eligibility cannot be automatically terminated as a result of the termination of SSI benefits. *Crippen v. Kheder*, 741 F.2d 102 (6th Cir. 1984).

There must be notice and a hearing if the right to appeal is invoked and the benefits of categorical eligibility must continue at least until a decision is rendered after the hearing, or if no hearing is requested, the benefits must continue until the state has determined if a person is eligible under some other category. *Crippen*, at 106, 107.

In the case of both BRADLEY and DONALDSON, no notice was provided so no hearing could take place. The result should be that they both, as a result of the omissions by AHCCCS, should be considered to have been categorically eligible at the time of their transplants.

B. Bradley and Donaldson Were Qualified Severely Impaired Individuals and Thus Remained Categorically Eligible at the Time of Their Transplants.

The statutory sections which authorize the heart and liver transplants needed by BRADLEY and DONALDSON (A.R.S. § 36-2907A(11) and E) allow coverage for those persons eligible pursuant to A.R.S. § 36-2901(4)(b) which in turn refers to 42 U.S.C. § 1396a(a)(10)(A)(i) (I & II) which provides that the state shall make medical assistance available, in addition to others, to all individuals:

> (II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter or who are qualified severely impaired individuals (as defined in section 1396d(q) of this title),

Both BRADLEY and DONALDSON meet the definitions contained in subsection (d)(q). They therefore remained categorically eligible.

C. Bradley and Donaldson Were in Need of Transplants During the Time They Were Categorically Eligible as a Result of Receiving SSI. Therefore, They Should Be Deemed to Remain Categorically Eligible Until They Actually Received the Transplants.

A transplant cannot be timed with any precision. It must occur when proper organs are found and matched. This can take months or longer. In such a case, the protection of the Medicaid statutes and regulations is thwarted when a state is allowed to escape coverage simply because the transplants took place when for no fault of the recipients they have been determined to be MN/MI eligible rather than categorically eligible as they were when it was first known a transplant was necessary.

D. Bradley, Donaldson and Bravo as Persons Who Were MN/MI Eligible at the Time of Their Transplants Were Similarly Situated to Other Persons Who Were Categorically Eligible Transplant Recipients.

42 U.S.C. § 1396b(i) requires that State Plans treat similarly situated individuals in need of transplants, the

same. "Similarly situated" means: "All patients who can be treated effectively by the same organ transplant procedure." *Dexter v. Kirschner,* 972 F.2d 1113, 1120 (9th Cir. 1992); *Salgado v. Kirschner,* 179 Ariz. 301, 306, 878 P.2d 659 (1994).

SCOTT BRADLEY and MARY BRAVO are within the class of persons who could be effectively treated with a heart transplant. ROBERT DONALDSON is within the class of persons who could be effectively treated with a liver transplant. To the extent that the State Plan as reflected in A.R.S. § 36-2907 attempts to exclude BRADLEY, DONALDSON and BRAVO simply because they are MN/MI eligible and not categorically eligible, it violates 42 U.S.C. § 1396b(i).

Clearly, the *Salgado* decision controls this issue. The outcome here must be the same. These transplants must be covered because they are similarly situated.

E. It is Unreasonable, Arbitrary, and Capricious to Use Categorical Eligibility as a Standard Because it Has No Relation to Need for a Transplant.

It is unreasonable to set standards that have nothing to do with need. Here, the need is organ transplantation to avoid certain death. It is the only treatment available. In *Salgado,* the court pointed out that unreasonable distinctions may not be made to deny life sustaining services. There, it was an age distinction that was unreasonable. Here, it is a status distinction.

Here, each party became eligible, ineligible, then the process repeated. For a while, BRADLEY and DONALDSON are categorically eligible, then they are not. Eligibility bounces back and forth like a yo-yo, but nothing really changed for the parties involved. They merely became the victims of being named categorical or MN/MI. There was nothing they could do to change that status. It was an artificial reasonableness test recognized in *Dexter* and *Salgado* has been violated. "Once a State adopts a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an *otherwise* eligible Medicaid recipient." (emphasis added). *Salgado*, at 306 Ariz.

F. Allowing Transplant Coverage to Persons Who Are Categorically Eligible and Denying it to Persons Who Are Eligible on the Basis of Medical Need and Indigency Violates the Privileges and Immunities Provision of the State Constitution and the Equal Protection Provisions of the U. S. Constitution.

Article 2, § 13 of the Arizona Constitution says:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

The Arizona Constitution does not allow the legislature to enact and maintain a law which favors one citizen or class of citizens and discriminates against another citizen. A.R.S. § 36-2907 unfortunately does exactly what art. 2, § 13 says a law should not do. The statute confers the privilege of a life sustaining organ transplant to one class of citizens, those categorically eligible, and withholds the privilege from those who, because of their circumstances, cannot belong to the favored class because they are MN/MI eligible.

The question under the Arizona equal protection clause is not whether the state has a rationale for passing such a law, but rather whether the law in fact discriminates between citizens. Here, the answer is crystal clear that the offending statute discriminates against every AHCCCS non categorically eligible citizen in this state who needs an organ transplant to survive unless that citizen has the good fortune to be categorically eligible at the precise time an organ is available. It does not make the law any less discriminatory by finding an excuse for the law and then calling that excuse a rational basis.

In *Dews v. Henry*, 297 F.Supp. 587 (1969), a three judge district court panel found that a statute enacted to cap welfare payments at the level of three recipients regardless of how many more persons might be in a family, violated equal protection as well as the Social Security Act. The court analyzed the state's attempt to save money as follows:

> "There seems to be no purpose served by the Arizona Statutes save to fit the needs of the State's dependent children into the State's inadequate appropriations. Discrimination of this type not to run afoul of the equal protection clause of the Fourteenth Amendment must be founded on reason in light of its purpose." *Dews*, at 592.

Here, AHCCCS attempts to artificially require a particular type of eligibility for no reason. The federal government will reimburse expenditures regardless of the label that is used.

The analysis to be undertaken in this case is suggested in a more contemporary case. In *Baresma v. Susong*, 156 Ariz. 309, 751 P.2d 969 (1988), the issue of concern was a statute passed as part of the Medical Malpractice Act of 1976, which precluded any evidence in a malpractice action that a witness was insured or had a financial interest in MICA. The statute went beyond the Rules of Evidence limitations and conflicted with the Rules. The opinion states:

> "Our evidentiary rules cannot be modified to accord special treatment to medical malpractice defendants insured by MICA as opposed to tort and medical malpractice defendants generally. *See*, Ariz. Const. art. 2, § 13; art. 4, pt. 2, § 19(13)." *Baresma*, at 314.

The problem in *Baresma* was that the statute conferred a benefit upon a few, those defendants insured by MICA as opposed to discriminating against a substantially greater number of persons who were otherwise insured by not conferring the same advantage upon them. The line was drawn at a point where the statute favored only a few without providing the same benefit to the greater number. The same result occurred in the instant case. The line was drawn at a point where only a few can receive the privilege of an organ transplant and the majority of persons who need such a life saving privilege are excluded. It is this type of line drawing that art. 2, § 13 was enacted to prohibit.

This case may also be decided under the Fourteenth Amendment equal protection clause by applying the rational basis test. The statute creates two classes of persons in need of a liver transplant. The classes are identical except for labels categorically eligible vs. MN/MI eligible. Such a classification can only be sustained under the Fourteenth Amendment if it rests upon a rational basis. It does not. A state subjects itself to scrutiny under the equal protection clause of the Fourteenth Amendment when it distributes benefits unequally. *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 617, 105 S.Ct. 2862, 2866, 86 L.Ed.2d 487 (1985).

Here, the benefits are organ transplants distributed unequally based upon eligibility status. In *Hooper,* the line was irrationally drawn between Vietnam Veterans who resided in New Mexico before May 8, 1976, who received the exemption and those who established residency after that date who were not entitled to the exemption. 105 S.Ct. at 2865. The *Hooper* majority could find no rational reason for the classification and found the statute violated equal protection. 105 S.Ct. at 2869.

Similarly, the classification here has no rational explanation. It is just based upon an artificial class. That is all.

G. AHCCCS' Contention that Donaldson and Bravo Were Only Eligible for Emergency Services is Wrong.

The parties anticipate that AHCCCS will make the argument that the eligibility determinations for MN/MI for BRAVO and DONALDSON are required to be made after the spendown [sic] occurred and therefore the only coverage available would be for emergency services. AHCCCS will further contend that transplants are not emergencies.

AHCCCS can only arrive at such a conclusion by insisting on the observance of its artificial policies which tend to make eligibility determinations follow the yo-yo pattern. This is contrary to Medicaid law.

The spendown [sic] for eligibility occurs when the expense is incurred, not a few days later. *Maricopa County v. AHCCCS*, 179 Ariz. 508, 511, 880 P.2d 728 (Az.App. 1994). According to the foregoing case, the eligibility for DONALDSON began on January 24, 1995, and for BRAVO on November 23, 1994.

AHCCCS's attempts to interpose a waiting period for MN/MI eligibility not imposed for categorical eligibility also violates 42 U.S.C. § 1396a(a)(10)(c)(i) which requires that the same methodology be utilized for eligibility determination for categorical and medically needy categories. And see, *Estate of Greer v. Chen, et al.*, slip Opinion, No. CIV. 93-1901 Phx RCB (U.S. Dist. Court Arizona 3-27-95).

The parties here have introduced evidence by Dr. Seifert, an eminently qualified physician who, among a multitude of other credits, is Board Certified in Emergency Medicine. It is his opinion that even if the eligibility determination is artificially delayed which would invoke the emergency services provision related to DONALDSON and BRAVO, the circumstances of an organ transplant meet the emergency criteria. There is no evidence in the record to the contrary.

The entire emergency coverage argument on the part of AHCCCS is a red herring. It is not central to the issues regarding AHCCCS's responsibility for payment of the organ transplants sought here. DONALDSON was actually categorically eligible when he was denied transplant coverage. BRAVO had previously been determined AHCCCS eligible as MN/MI when she was denied transplant coverage. The point then is the denial of coverage. If the denials were wrong, which they were, the eligibility status at the time of the transplants was irrelevant.

IV. Conclusion

AHCCCS continues to create artificial barriers to attempt to avoid paying the costs of organ transplants. The barrier here is the guise that categorical eligibility status must exist to be eligible for organ transplant coverage. This distinction cannot survive the scrutiny of the reasonableness test and treats those who are similarly situated differently. As a result, the federal Medicaid laws and regulations and the Arizona and U. S. Constitution are violated.

Moreover, BRADLEY and DONALDSON should be considered to have been within the artificial rubric of categorical eligibility because AHCCCS failed to give them notice of termination of that status, failed to give them notice of a right to appeal, and failed to notify them that they could be determined to be qualified severely impaired individuals. In fact, both *Bradley* and *Donaldson* fully met the criteria required to be labeled as qualified severely impaired individuals. Just as importantly, they both were categorically eligible at the time it was medically determined that a transplant was the only medically appropriate procedure to sustain their lives.

Currently, transplants are covered for all AHCCCS eligible persons, whether they are MN/MI or categorically eligible. The current law also reflects the reality that the spendown [sic] cannot generally occur until the transplant operations is underway, and protects the individuals' AHCCCS eligibility.

These three cases provide an excellent opportunity for AHCCCS to meet its responsibility to cover these transplants by rendering a decision to do so. This will avoid the protracted and expensive judicial process that could lead to further precedent that AHCCCS might find troublesome in the future and will certainly better serve the taxpayers of this state.

Respectfully submitted this 2nd day of May, 1996.

/s/ Howard Baldwin
HOWARD BALDWIN,
ATTORNEY FOR
PIMA COUNTY, ET AL.

Copy of the foregoing
delivered on May 2, 1996, to:

Michael D. Curran, Esq.
Johnston, Maynard, Grant & Parker
3200 N. Central Ave., #2300
Phoenix, AZ 85012-2443

Arthur J. Davich, Esq.
AHCCCS Hearing Officer
801 East Jefferson
Phoenix, AZ 85034

U.S. CONSTITUTION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***10448 Ariz. Admin. Code R9-22-341**

ARIZONA ADMINISTRATIVE CODE
TITLE 9. HEALTH SERVICES
CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM, (AHCCS) ADMINISTRATION
ARTICLE 3. ELIGIBILITY AND ENROLLMENT

Current through September 30, 1997

R9-22-341. Priority processing of medically needy and indigent applications of persons facing a loss of categorically eligible status as a result of the termination of SSI benefits

A. Persons may appeal to the Administration from the proposed termination of their categorical coverage. They may also apply for medically needy or indigent coverage whether or not they choose to appeal such proposed termination.

B. Within ten days after the date on which the Administration receives notification from the Social Security Administration that a person currently eligible as an SSI recipient is ineligible for receipt of SSI, the Administration shall mail to such person a notice of proposed termination of categorical eligibility and a pre-printed, postage-prepaid postcard. The postcard may be used by the person to initiate the eligibility determination process for indigent or medically needy coverage.

C. A person facing the loss of categorical eligibility status, as a result of the termination of SSI benefits, who has mailed to his county of residence the pre-printed postcard requesting an appointment, signed and postmarked within seven days after the date of the notice of proposed termination, shall be processed as follows:

1. If the pre-printed postcard indicates that the person may be in immediate or ongoing need of medical care, the county shall determine the person's indigent or medically needy eligibility within 20 days after the date of the postmark on the postcard. If the postmark date is not legible, the 20-day period shall commence on the date that the county receives the postcard.

2. If the pre-printed postcard indicates that the person believes he or she may need a medical examination or medical care in the next 30 days or more, the county shall determine the person's indigent or medically needy eligibility within 30 days after the date of the postmark on the postcard. If the postmark date is not legible, the 30-day period shall commence on the date that the county receives the postcard.

3. If the circumstances described in subsections (C), paragraphs (1) or (2) of this Section are not applicable, the county shall determine the person's indigent or medically needy eligibility with [sic] 60 days after the date of the postmark on the postcard. If the postmark date is not legible, the 60-day period shall commence on the date that the county receives the postcard.

4. When the county receives a timely mailed, preprinted postcard, the county shall initiate the indigent and medically needy eligibility determination process by mailing to the person who has requested such a determination a notice, setting forth:

a. The fact that the county is prepared to take the indigent and medically needy application and interview the person.

b. At least one appointment date and time at which county eligibility staff will take the person's application and interview the person.

c. An instruction that the person should immediately contact county eligibility staff to select one of the interview dates and times thus offered him or her, or arrange, if possible, an alternative, permissible date and time.

d. A warning that failure to attend an appointment at any of the specified dates and times, without arranging an alternative, may prevent county eligibility staff from making an eligibility determination within the time and in the manner otherwise required by the person's request.

e. A reminder that the person should review the material on verification of eligibility information previously received from the Administration, and immediately make every effort to obtain the documentation specified therein for presentation at his or her interview.

f. An instruction that the person should also bring to the interview the notice of proposed termination of categorical eligibility that he or she previously received from the Administration.

5. County eligibility staff shall arrange appointments and send the notice required by subsection (C), paragraph (4) of this Section at times that not only permit

eligibility determinations within the time limits established by subsection (C), paragraphs (1) through (3) of this Section, but are not so near in time to the postmark date on the postcard that attending appointments on the days specified in the notice imposes an undue burden on the applicant.

D. The notice of proposed termination of categorical eligibility shall include the person's name, social security number and date of birth. If the person presents the notice at his or her interview as requested, it shall in all cases be deemed sufficient evidence of Arizona residency, date of birth and social security number. The county eligibility staff shall make a copy of the notice and include it in the case record. The original or coy of the notice presented by the applicant shall be returned to the applicant.

E. Except as otherwise provided in this Section, all requirements of this Article applicable to priority applications for medically needy and indigent coverage shall apply.

42 C.F.R. 431.201

TITLE 42 - PUBLIC HEALTH

CHAPTER IV - HEALTH CARE FINANCING ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 431 - STATE ORGANIZATION AND GENERAL ADMINISTRATION

Subpart E - Fair Hearings for Applicants and Recipients

Sec. 431.201 Definitions.

For purposes of this subpart:

Action means a termination, suspension, or reduction of Medicaid eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Adverse determination means a determination made in accordance with sections 1919(b) (3) (F) or 1919(e) (7) (B) of the Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the determination made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e) (7) of the Act.

De novo hearing means a hearing that starts over from the beginning.

Evidentiary hearing means a hearing conducted so that evidence may be presented.

Notice means a written statement that meets the requirements of Sec. 431.210.

Request for a hearing means a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.

---

42 C.F.R. 431.206

Sec. 431.206 Informing applicants and recipients.

(a) The agency must issue and publicize its hearing procedures.

(b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing –

(1) Of his right to a hearing;

(2) Of the method by which he may obtain a hearing; and

(3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.

(c) The agency must provide the information required in paragraph (b) of this section – (1) At the time that the individual applies for Medicaid;

(2) At the time of any action affecting his or her claim;

(3) At the time a skilled nursing facility or a nursing facility notifies a resident in accordance with Sec. 483.12 of this chapter that he or she is to be transferred or discharged; and

(4) At the time an individual receives an adverse determination by the State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

---

42 C.F.R. 431.210

Sec. 431.210 Content of notice.

A notice required under Sec. 431.206 (c) (2), (c) (3), or (c) (4) of this subpart must contain –

(a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;

(b) The reasons for the intended action;

(c) The specific regulations that support, or the change in Federal or State law that requires, the action;

(d) An explanation of –

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

---

42 C.F.R. 431.211

Sec. 431.211 Advance notice.

The State or local agency must mail a notice at least 10 days before the date of action, except as permitted under Secs. 431.213 and 431.214 of this subpart.

---

42 C.F.R. 431.230

Sec. 431.230 Maintaining services.

(a) If the agency mails the 10-day or 5-day notice as required under Sec. 431.211 or Sec. 431.214 of this subpart, and the recipient requests a hearing before the date of action, the agency may not terminate or reduce services until a decision is rendered after the hearing unless –

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) The agency promptly informs the recipient in writing that services are to be terminated or reduced pending the hearing decision.

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or recipient to recoup the cost of any services furnished the recipient, to the extent they were furnished solely by reason of this section.

---

42 C.F.R. 431.243

Sec. 431.243 Parties in cases involving an eligibility determination.

If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing.

---

42 C.F.R 435.902

PART 435 – ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIAN [sic] ISLANDS

Subpart J – Eligibility in the States and District of Columbia

Sec. 435.902 Simplicity of administration.

The agency's policies and procedures must ensure that eligibility is determined in a manner consistent with simplicity of administration and the best interests of the applicant or recipient.

42 U.S.C. 1396d(q)

(q) Qualified severely impaired individual

The term "qualfied severely impaired individual" means an individual under age 65 –

(1) who for the month preceding the first month to which this subsection applies to such individual –

(a) received (i) a payment of supplemental security income benefits under section 1382(b) of this title on the basis of blindness or disability, (ii) a supplementary payment under section 1382e of this title or under section 212 of Public Law 93-66 on such basis, (iii) a payment of monthly benefits under section 1382h(a) of this title, or (iv) a supplementary payment under section 1382e(c)(3), and

(B) was eligible for medical assistance under the State plan approved under this subchapter; and

(2) with respect to whom the Commissioner of Social Security determines that –

(A) the individual continues to be blind or continues to have the disabling physical or mental impairment on the basis of which he was found to be under a disability and, except for his earnings, continues to meet all non-disability-related requirements for eligibility for benefits under subchapter XVI of this chapter,

(B) the income of such individual would not, except for his earnings, be equal to or in excess of the amount which would cause him to be ineligible for payments under section

1382(b) of this title (if he were otherwise eligible for such payments),

(C) the lack of eligibility for benefits under this subchapter would seriously inhibit his ability to continue or obtain employment, and

(D) the individual's earnings are not sufficient to allow him to provide for himself a reasonable equivalent of the benefits under subchapter XVI of this chapter (including any federally administered State supplementary payments), this subchapter, and publicly funded attendant care services (including personal care assistance) that would be available to him in the absence of such earnings.

In the case of an individual who is eligible for medical assistance pursuant to section 1382h(b) of this title in June, 1987, the individual shall be a qualified severely impaired individual for so long as such individual meets the requirements of paragraph (2).

42 C.F.R. 435.120

PART 435 – ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS

Subpart B – Mandatory Coverage of the Categorically Needy

Sec. 435.120 Individuals receiving SSI.

Except as allowed under Sec. 435.121, the agency must provide Medicaid to aged, blind, and disabled individuals or couples who are receiving or are deemed to be receiving SSI. This includes individuals who are –

(a) Receiving SSI pending a final determination of blindness or disability;

(b) Receiving SSI under an agreement with the Social Security Administration to dispose of resources that exceed the SSI dollar limits on resources; or

(c) Receiving benefits under section 1619(a) of the Act or in section 1619(b) status (blind individuals or those with disabling impairments whose income equals or exceeds a specific Supplemental Security Income limit). (Regulations at 20 CFR 416.260 through 416.269 contain requirements governing determinations of eligibility under this provision.) For purposes of this paragraph (c), this mandatory categorically needy group of individuals includes those qualified severely impaired individuals defined in section 1905(q) of the Act.

PUBLIC HEALTH AND WELFARE

42 U.S.C. § 1396b(i)

(i) Payments for organ transplants; item or service furnished by excluded individual, entity, or physician; other restrictions

Payment under the preceding provisions of this section shall not be made –

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that –

(A) similarly situated individuals are treated alike; and

(B) any restriction, on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan; or

Nothing in paragraph (1) shall be construed as permitting a State to provide services under its plan under this subchapter that are not reasonable in amount, duration, and scope to achieve their purpose.

42 U.S.C. § 1396a(a)(3)

§ 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

* * *

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

* * *

LEGISLATIVE HISTORY
HOUSE REPORT NO. 100-391(I)

OMNIBUS BUDGET RECONCILIATION ACT
P.L. 100-203
[page 531-532]

(d) Organ transplant technical. – Under current law, States must offer certain "mandatory" services, such as inpatient hospital and physicians' services, each of which must be sufficient in amount,

[page 532]

duration, and scope to reasonably achieve its purpose. States may not arbitrarily deny or reduce the amount, duration, or scope of a mandatory service solely because of an individual's diagnosis, type of illness, or condition. To assure that State coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations, section 9507 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 99-272, requires that a State which covers organ transplant procedures set forth under its Medicaid plan written standards respecting the coverage of such procedures. Under these standards, similarly situated individuals must be treated alike.

The Committee wishes to clarify that the organ transplant procedures which a State covers, and the hospital, physician, and other services these procedures entail, must be sufficient in amount, duration, and scope to reasonably achieve their purpose. For example, if a State covers liver transplants for patients with one medical condition but not for patients with another, and if a liver transplant is medically indicated and not experimental with respect to each condition, the State's plan would be out of compliance with the amount, duration, and scope requirement. The Committee amendment would clarify that the current law requirements for written standards respecting organ transplant procedures must not be construed by HCFA or the States to permit States to provide services that are not reasonable in amount, duration, and scope to achieve their purpose. The amendment is effective as if included in section 9507 of COBRA.

LEGISLATIVE HISTORY
HOUSE CONF. REP. NO. 100-495
[page 756]

(e) *Organ Transplant Technical.* – States which choose to cover organ transplant procedures may restrict the facilities or practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care, and so long as similarly situated individuals are treated alike. States may restrict the facilities of practitioners from whom Medicaid beneficiaries may obtain the services, so long as the restrictions are consistent with accessibility of high quality care.

* * *

(k) *Medically Needy Incurred Expenses.* – Medically needy beneficiaries may qualify for Medicaid by incurring medical expenses sufficient to reduce their income and resources to levels established by the State's eligibility standards. Only medical expenses from which the applicant is actually liable may be counted as "incurred" for this purpose.

Laws of 99th Cong. – 2nd Sess.
P.L. 99-272 Section 9507.

SEC. 9507. WRITTEN STANDARDS FOR PROVISION OF ORGAN TRANSPLANTS.

(a) Denial of Federal Payments for Organ Transplants Unless Provided Under Written Standards. – Section 1903(i) of the Social Security Act (42 U.S.C. 1396b(i)) is amended by inserting before paragraph (2) the following new paragraph:

> "(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that –
>
> > "(A) similarly situated individuals are treated alike; and
> >
> > "(B) any restriction, on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan."

(B) Effective Date. – The amendments made by subsection (a) shall apply to medical assistance furnished on or after January 1, 1987.

Howard Baldwin
Attorney for Plaintiffs
22 East University Blvd.
Tucson, Arizona 85705-7737

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic,

Plaintiffs,

vs.

JOHN H. KELLY, in his capacity as Acting Director of Arizona Health Care Cost Containment System; and THE STATE OF ARIZONA,

Defendants.

NO. CV 96-21041

REVIEW OF ADMINISTRATIVE DECISION

(Judge Michael J. O'Melia)

PLAINTIFFS' OPENING BRIEF

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

A. Scott Bradley 2

B. Robert Donaldson 4

C. Mary Bravo 6

D. Facts Common to All Three Cases 8

STATEMENT OF ISSUES 9

ARGUMENT: 10

A. The Director erred by failing to determine that Bradley and Donaldson were categorically eligible at the time of their transplants because of AHCCCS' failure to give notice of termination of SSI benefits and right of appeal 11

B. The Director erred by not finding that Bradley and Donaldson were qualified severely impaired individuals and thus remained categorically eligible at the time of their transplants 13

C. The Director erred by not finding that since Bradley and Donaldson were in need of transplants during the time they were categorically eligible as a result of receiving SSI, they should have been deemed to remain categorically eligible until they actually received the transplants 15

D. It was erroneous for the Director to assume that Bradley and Donaldson had to be categorically eligible at the time of their transplant rather than at the time they were found to be in need of transplants 17

E. The effect of the Director's overlooking the erroneous May, 1994 denial of Donaldson's request for a liver transplant when he was categorically eligible was error.............. 17

F. The Director erred by not finding that Bradley, Donaldson, and Bravo, were, as persons who were MN/MI eligible at the time of their transplants, "similarly situated" to other persons who were categorically eligible transplant recipients 18

G. The Director erred by not finding that Bradley and Donaldson who were considered not categorically eligible on the actual day of their transplants but were previously categorically eligible, were "similarly situated" to categorically eligible persons who are eligible on the actual day of transplantation .. 19

H. The Director erred by not finding that it is unreasonable, arbitrary, and capricious to use categorical eligibility as a standard because it has no relation to need for a transplant 20

I. The Director erred by failing to find that allowing transplant coverage to persons who are categorically eligible and denying it to persons who are eligible on the basis of medical need and indigency, violates the Privileges and Immunities provision of the state constitution and the Equal Protection provisions of the U.S. Constitution 20

J. The Director erred by finding that Donaldson and Bravo were only eligible for Emergency Services and concluding that they were subject to the "sudden onset" rule.............. 23

CONCLUSION 25

TABLE OF CITATIONS

Cases: Page:

Arizona Health Care Cost Containment System Administration v. Carondelet Health System, 1996 WL 408702, ICA-CV 93-0175 and ICA-CV 93-0335 24

Baresma v. Susong, 156 Ariz. 309, 751 P.2d 969 (1988) 22

Brillo v. Schaller, Case No. 233587, Pima County Superior Court, June 13, 1986 19

Crippen v. Kheder, 741 F.2d 102 (6th Cir. 1984) . . . 11, 12, 13

Dews v. Henry, 297 F.Supp. 587 (1969) 21

Dexter v. Kirschner, 972 F.2d 1113, 1120 (9th Cir. 1992) 18, 19, 20

Estate of Greer v. Chen, et al., Slip Opinion, No. CIV. 93-1901 Phx RCB (U.S. Dist. Court Arizona 3-27-95) 24

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) 12

Haymons v. Williams, 795 F.Supp. 1511 (M.D. Fla. 1992) 13

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 617, 105 S.Ct. 2862, 2866, 86 L.Ed.2d 487 (1985) 23

Maricopa County v. AHCCCS, 179 Ariz. 508, 511, 880 P.2d 728 (Az. App. 1994) 24

Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749 (1st Cir. 1983) 13

Rodriguez v. Chen, No. CV 95-130-TUC-RMB (Dist. Ct. Az. 1996) 12, 13

Salgado v. Kirschner, 179 Ariz. 301, 306, 878 P.2d 659 (1994) 6, 17, 18, 19, 20

Constitution and Statutes:

Page:

U.S. Constitution Fourteenth Amendment 22

42 U.S.C. § 1396a(a)(10)(A)(i) (I & II) 13

42 U.S.C. § 1396a(a)(10)(c)(i) 24

42 U.S.C. § 1396a(a)(3)............................... 13

42 U.S.C. § 1396d(q).............................4, 14

42 U.S.C. § 1396b(i)................................ 18

Article 2, § 13 of the Arizona Constitution.......... 20

A.R.S. § 36-2901(4)(b) 13

A.R.S. § 36-2907 ....18, 21

A.R.S. § 36-2907A(11)...........................13, 19

A.R.S. § 36-2907E.................................. 16

Senate Bill 1001, § 1B Third Special Session Forty-Second Legislature, 1995.......................... 16

Senate Bill 1001, § 4 Third Special Session Forty-Second Legislature, 1995.......................... 16

Rules and Regulations:

42 C.F.R. § 431.201 13

A.A.C. R9-22-341 A, B and D...................... 12

A.A.C. R9-22-341 ....3, 5

A.A.C. R9-22-804 1

I

STATEMENT OF CASE

This case consists of three cases consolidated. Scott Bradley was denied a heart transplant by AHCCCS. Mary Brown [sic] was denied a heart transplant by AHCCCS. Robert Donaldson was denied a liver transplant by AHCCCS. The AHCCCS denials were based upon its contention that none of these AHCCCS eligible persons were categorically eligible.

Pima County interceded in each case to save the lives of Scott Bradley, Mary Brown, and Robert Donaldson by guaranteeing payment and then demanding payment from AHCCCS for reimbursement of the amounts expended by the County.

Payment was refused on May 31, 1995, and the Plaintiffs appealed the decision and requested an investigation and hearing pursuant to Rule R9-22-804, A.A.C. An evidentiary hearing was held before an AHCCCS hearing officer on April 2, 1996. The hearing officer made a recommended decision to the Director of AHCCCS on June 5, 1996 and the Director rendered his decision adopting the hearing officer's decision and denying the appeal on June 27, 1996.

Plaintiffs requested a rehearing and/or review of the Director's decision on July 12, 1996. A final decision was rendered by the Director on September 19, 1996 and this action was filed in the Pima County Superior Court on October 2, 1996.

Defendant AHCCCS filed a motion for change of venue on November 4, 1996 and the Parties stipulated that venue could be changed to Maricopa County. The administrative record was filed on December 5, 1996.

The decision of the Director in this case was in essence that AHCCCS would not be responsible for the transplants because in his view, the Plaintiffs Bradley, Bravo, and Donaldson were not categorically eligible at the actual time they received their organ transplants. It is the Plaintiffs position that the decision was not based upon the facts presented and was contrary to law.

II.

STATEMENT OF FACTS

The facts adduced at the April 2, 1996 hearing on this matter establish the following:

A. Scott Bradley:

On February 15, 1993, Scott Bradley, born June 7, 1952, then age 40, was diagnosed as having a terminal heart condition known as idiopathic cardiomyopathy, thought to have been caused by a viral infection. His condition was so severe that only a heart transplant would sustain his life. (R-242-245)

He had been a wage earner for approximately 25 years at the onset of his illness. He also was married, had a two year old son and his wife was expecting a child. (R-242-245)

Scott Bradley could no longer work, and he and his family became eligible for Aid to Families with Dependent Children (AFDC). (R-275) Also, as a result of receiving the AFDC, he became categorically or mandatorily eligible for AHCCCS coverage effective March 1, 1993. (R-106 and R-275)

Because he was receiving AFDC, Scott Bradley was required by the Arizona Department of Economic Security (DES) to make application for Supplemental Security Income (SSI) or Social Security Disability (SSD). (R-153)

In September 2, 1993, he was found eligible for SSI payments retroactive as of March 1993. (R-110 and R-276-281) At the same time, for purposes of SSD, he was determined to be disabled and unable to work as of February 14, 1993. His entitlement for SSD began as of August 1993 and he could not refuse to accept the payment in order to maintain his eligibility for AFDC or SSI. (R-282 and R-153)

His monthly income from SSD, based upon his previous payments into Social Security, was $701.00 per month. This resulted in his eligibility for SSI and AFDC being terminated as of August 1993 because the payments received from SSD caused him to be over the allowable income limits. As a result, he also lost his categorical/mandatorily eligibility status for AHCCCS coverage. (R-116 and R-183-187) He had no other income. (R-183-187)

AHCCCS was required by its regulations, the State Plan, and federal law to notify Scott Bradley in writing of his loss of categorical eligibility (A.A.C. R9-22-341) and it failed to do so. AHCCCS also failed to notify Scott Bradley of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual". (R-155-156)

In spite of the foregoing, Scott Bradley applied for AHCCCS coverage as an MN/MI person. By "spending down," Scott Bradley was able to attain his eligibility for AHCCCS as a medically needy/medically indigent (MN/MI) person and he was so eligible when he received his heart transplant on January 24, 1995. (R-114)

Between December 1993 and February 1994, he applied for and was denied transplant coverage by his AHCCCS provider, Pima Health System, on the basis he was not categorically eligible. (R-283) He appealed the decision of Pima Health System and also reapplied for AFDC coverage, was denied, and appealed that decision. Both appeals were denied. (R-287-290)

On March 22, 1994, the Pima County Board of Supervisors adopted a policy to give coverage to persons in Mr. Bradley's situation for a heart transplant, providing he was otherwise AHCCCS eligible at the time of the transplant. The policy was later amended on June 7, 1994. (R-29-30 and R-207)

An attorney for Pima County, Michael Callahan, in approximately mid year 1994 contacted AHCCCS in an attempt to determine how a person such as Scott Bradley could be classified by AHCCCS to be a qualified severely impaired individual pursuant to 42 U.S.C. 1396d(q) and was told AHCCCS had no process for making such a decision. (R-407)

The heart transplant was medically necessary and the only appropriate medical procedure available to sustain

Scott Bradley's life. The Pima County Medical Review Board found the transplant to be medically necessary and approved the application for a transplant on May 23, 1994. (R-70 and R-247) Scott Bradley received a heart transplant at University Medical Center on January 24, 1995. (R-75 and R-248)

Pima County paid the amount of $91,752.05 for the medical services necessary for Scott Bradley's transplant, which was discounted from the billed charges which were $138,406.13. Pima County also incurred $2,600.00 for administrative costs. (R-27 and R-194-195)

Scott Bradley assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS to Pima County on November 4, 1994. (R-28 and R-203) A Demand was made April 28, 1995 upon the Director of AHCCCS. (R-194-195)

B. Robert Donaldson:

The facts presented at the hearing establish the following concerning Robert Donaldson:

Robert Donaldson was born December 21, 1956. (R-259) At the time of the liver transplant, he was a 38 year old divorced person, parent of three children. He was diagnosed as having a fatal liver disease in 1993. (R-259-262)

Robert Donaldson has worked most of his adult life and prior to his illness. He was employed as a maintenance technician for an automobile rental agency. He became unable to work because of his liver disease in approximately 1993. (R-259-262)

He first became AHCCCS eligible September 1, 1993 as an MN/MI. He became categorically/mandatorily eligible when he became eligible for SSI payments on May 1, 1994. (R-188-190 and R-291)

As a result of receiving SSD, he became ineligible beginning November 1, 1994 for categorical coverage. (R-293) He had no other income. (R-188-190)

AHCCCS was required by its regulations, the State Plan, and federal law to notify Robert Donaldson in writing of his loss of categorical eligibility (A.A.C. R9-22-341) and it failed to do so. AHCCCS also failed to notify him of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual." (R-155-156)

In spite of the foregoing, Robert Donaldson reapplied as an MN/MI and as a result of spendown which occurred on January 24, 1995, he was again MN/MI eligible as of January 24, 1995. (R-121 and R-188-190)

Robert Donaldson and his physician, Lane Johnson, M. D., first requested a transplant in May 1994, and was denied by his AHCCCS provider, University Famli-Care on May 5, 1994, which was erroneous because he was in fact categorically eligible at the time. (R-297) His second request for a liver transplant was denied by his subsequest [sic] AHCCCS provider, Cigna Community Choice, on February 10, 1995, because he was not categorically eligible. (R-298)

Pima County, under its Liver Transplant Policy established for Elizabeth Salgado, (R-223-228) approved payment up to its contracted amount for a liver transplant provided DONALDSON remained AHCCCS eligible and the transplant was approved by the Pima County Medical Review Board. (R-223-228)

The Pima County Medical Review Board approved Robert Donaldson as an appropriate liver transplant candidate on August 15, 1994. (R-264) Pima County authorized coverage for a liver transplant on August 16, 1994 during which time he was also categorically eligible. (R-188-190 and R-264) The liver transplant was medically appropriate, medically necessary, and the only medical procedure available to sustain Robert Donaldson's life. (R-70)

Robert Donaldson received his liver transplant at Good Samaritan Regional Medical Center on January 24, 1995. (R-265) The total amount of billed charges for Robert Donaldson's liver transplant and related care were $704,686.67, but due to Pima County's contract with the provider, a maximum coast [sic] had been agreed upon. Pima County paid the amount of $155,365.89 for the liver transplant and the medical costs associated with Robert Donaldson's liver transplant for the period that he was MN/MI eligible but not categorically eligible. Pima County also incurred $3,250.00 in administrative costs. (R-31-32 and R-214)

Robert Donaldson would have been eligible for AHCCCS coverage based upon the *Salgado* decision, had he remained categorically eligible as of the transplant date. (R-263)

Robert Donaldson assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS, to Pima County on May 30, 1995. (R-32, R-219, and R-129) He had no income except SSD. (R-188-190)

C. Mary Bravo:

The facts at the April 2, 1996 hearing related to Mary Bravo establish the following:

Mary Bravo, a married woman, was born July 2, 1935, and was found to be disabled for purposes of Social Security Disability payments retroactive to February 2, 1993. Prior to that time, she had worked as a club manager for American Legion. (R-299)

She was diagnosed in February 1993 as having idiopathic cardiomyopathy, and since that time had multiple hospitalizations for congestive heart failure. On April 7, 1994, Mary Bravo's attending physician recommended cardiac transplantation. (R-267)

On May 25, 1994, her AHCCCS provider, Health Choice Plan, denied coverage on the basis that she was not categorically eligible. (R-307)

On June 21, 1994, the Pima County Board of Supervisors voted to cover the costs of Mary Bravo's heart transplant under its transplant policies which required that she be AHCCCS eligible at the time of the transplant and her transplant be approved by the Pima County Medical Review Board. (R-207)

On August 15, 1994, the Pima County Medical Review Board found Mary Bravo to be an appropriate candidate for a heart transplant. (R-274) A heart transplant was medically necessary and the only appropriate medical procedure to sustain Mary Bravo's life. (R-70) She received a heart transplant at University Medical Center on November 23, 1994 and again became MN/MI AHCCCS eligible at the time. (R-41 and R-240-241)

Mary Bravo originally became eligible for MN/MI AHCCCS status January 1994. Mary Bravo had applied for SSI benefits, but was determined not to be eligible because of family income. She was determined to be eligible for SSD because she was a wage earner. After receiving the SSD benefits, she became ineligible, but further medical expenses made her MN/MI eligible again at the time of the transplant as a result of spending down. She would have been eligible for a heart transplant had she been categorically eligible at the time of her heart transplant. (R-127-130)

Pima County paid the amount of $68,939.66 for the medical services necessary for Mary Bravo's transplant which was discounted from the billed charges which were $122,213.95. Pima County also incurred administrative costs in the amount of $3,500.00. (R-36 and R-229-235)

Mary Bravo assigned all rights related to payment and recovery of costs against the State of Arizona or AHCCCS to Pima County on February 17, 1995. (R-37 and R-236) A demand for payment was made by Pima County to Mabel Chen, Director of AHCCCS, on May 31, 1995. (R-36 and R-229)

D. Facts Common to All Three Cases:

Scott Bradley, Robert Donaldson, and Mary Bravo were all recipients of SSD at the time of their transplants. Persons who are eligible for SSD are also eligible for Medicare which would cover the transplants. However, Medicare does not become effective until the expiration of two years from the initial receipt of SSD. (R-154)

A person is determined to be eligible for SSD based upon past earning of wages. The amount of past wages also determines the amount of SSD that will be paid. (R-155)

Scott Bradley, Robert Donaldson, and Mary Bravo could not refuse the SSD in order to continue to receive SSI or to establish or preserve their status of being categorically eligible for Medicaid. (R-153-154)

It is undisputed that if any of the parties here were considered to be categorically eligible at the time of their transplants, they would be covered by AHCCCS.

Each of the three transplants were medically necessary. (R-70) The period of time between when a person needs an organ transplant and can actually receive is conditioned upon the availability of an organ and an adequate physiological condition to receive the transplant. (R-86-88) Throughout this time period a person is in immediate and emergent need of a transplant. (R-86 and R-308)

III

STATEMENT OF THE ISSUES

A. Did the Director err by failing to determine that Bradley and Donaldson were categorically eligible at the time of their transplants because of AHCCCS' failure to give notice of termination of SSI benefits and right of appeal?

B. Did the Director err by not finding that Bradley and Donaldson were qualified severely impaired individuals and thus remained categorically eligible at the time of their transplants?

C. Did the Director err by not finding that since Bradley and Donaldson were in need of transplants during the time they were categorically eligible as a result of receiving SSI, they should have been deemed to remain categorically eligible until they actually received the transplants?

D. Was it erroneous for the Director to assume that Bradley and Donaldson had to be categorically eligible at the time of their transplant rather than at the time they were found to be in need of transplants?

E. What is the effect of the Director's overlooking the erroneous May, 1994 denial of Donaldson's request for a liver transplant when he was categorically eligible?

F. Did the Director err by not finding that Bradley, Donaldson, and Bravo, were, as persons who were MN/MI eligible at the time of their transplants, "similarly situated" to other persons who were categorically eligible transplant recipients?

G. Did the Director err by not finding that Bradley and Donaldson who were considered not eligible as the actual day of their transplants but were previously categorically eligible, were "similarly situated" to categorically eligible persons who are eligible on the actual day of transplantation?

H. Did the Director err by not finding that it is unreasonable, arbitrary, and capricious to use categorical eligibility as a standard because it has no relation to need for a transplant?

I. Did the Director err by failing to find that allowing transplant coverage to persons who are categorically eligible and denying it to persons who are eligible on the basis of medical need and indigency, violates the Privileges and Immunities provision of the state constitution and the equal protection provisions of the U. S. Constitution?

J. Did the Director err by finding that Donaldson and Bravo were only eligible for Emergency Services and concluding that they were subject to the "sudden onset" rule?

IV

ARGUMENT

Introduction:

The entire AHCCCS system (Arizona's Medicaid System) has operated in the past to discriminate against, indeed to discourage, frustrate, and prevent those eligible persons whose medical condition is so deteriorated that only an organ transplant can save their lives. These cases of Scott Bradley, Mary Brown [sic] and Robert Donaldson are prime examples of how this has continued to occur. Had Pima County not interceded, none of them would have survived.

In the past, AHCCCS has unsuccessfully resisted with every means available requests for organ transplants by claiming they were experimental (Brillo), that they should only be provided to children (Salgado) and now on the basis that a person must not just be categorically eligible, but must be categorically eligible at the precise moment that they are transplanted with another organ. This is a very small hoop for a transplant candidate to attempt to jump through. Only the most fortunate can succeed given the rules of AHCCCS' game. Unfortunately, the penalties are stiff. Death.

Scott Bradley was categorically eligible at the time it was discovered that it was medically necessary that he have a heart transplant. The same is true concerning Robert Donaldson when he was found to be in need of a liver transplant. The only reason that both Bradley and Donaldson lost their status of categorically eligibility in the eyes of AHCCCS was that they both were forced to apply for Social Security Disability (SSD) benefits which ironically then disqualifies them. When they were deemed eligible for Social Security disability benefits they immediately lost both their categorical eligibility and their MN/MI eligibility because they received too much money. The SSD in Donaldson's case, was $701.00 a month, and in Bradley's case, $1,038.00. Had neither of them been wage earners in the past, they would have continued to receive SSI and remained categorically eligible throughout.

The same thing occurred with Mary Bravo, except that she never got to the point of receiving SSI because she was deemed eligible for SSD immediately because of her husband's income and her work history.

Of course, the good news was that all three, Bradley, Bravo, and Donaldson, as SSD recipients, became concurrently eligible for Medicare which covers heart and liver transplants. Unfortunately, eligibility for Medicare does not take place for two years after the eligibility for SSD. There is a high probability that none of them would have survived two years.

Had AHCCCS followed its own regulations and Arizona statutes, or provided proper mechanisms to assist the Plaintiffs in preserving their categorical status, at least Bradley and Donaldson would have been eligible for their transplants.

Had AHCCCS followed the federal statutes, regulations and case law, all three transplants should have been covered. It is the purpose of the following arguments to demonstrate to this Court how AHCCCS has failed to follow the law.

Arguments:

A. The Director erred by failing to determine that Bradley and Donaldson were categorically eligible at the time of their transplants because of AHCCCS' failure to give notice of termination of SSI benefits and right of appeal.

The status of Medicaid categorical eligibility cannot be automatically terminated as a result of the termination of SSI benefits. *Crippen v. Kheder*, 741 F.2d 102 (6th Cir. 1984). To comply with procedural due process when terminating medical benefits meaningful written notice must be provided. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

There must be notice and a hearing if the right to appeal is invoked and the benefits of categorical eligibility must continue at least until a decision is rendered after the hearing, or if no hearing is requested, the benefits must continue until the state has determined if a person is eligible under some other category. *Crippen*, at 106, 107.

In Bradley's case and in Donaldson's, AHCCCS failed to provide notice of termination of their categorical status, to advise of a right to appeal, and to advise of a right to a determination that each were qualified severely handicapped individuals. This was a direct violation of R9-22-341 A, B and D, which provides that the AHCCCS administration must give written notice of termination of the categorical coverage and offer a right to appeal.

The foregoing is the JASSO notice which the testimony conclusively established was not provided by AHCCCS. In *Rodriguez v. Chen*, No. CV 95-130-TUC-RMB (Dist. Ct. Az. 1996), the court found that the AHCCCS system of giving notice that existed when the facts in the instant case arose was constitutionally deficient, not meaningful, was vague and did not apprise the recipient of AHCCCS' proposed action. The *Rodriguez* court concluded that the foregoing failures of the AHCCCS notices violated both the letter and spirit of due process and the applicable Medicaid statutes and regulations. *Rodriguez*, at p.6.

Unlike *Rodriguez*, the instant case involves not giving any notice whatsoever. The result is that the procedural due process rights of Scott Bradley and Robert Donaldson were clearly violated as well as the specific provisions of the state statutes and regulations governing AHCCCS and the federal Medicaid statutes and regulations.

It should be noted also that the Director's statement that, " . . . However, witness Michelle Castiglione gave unopposed testimony that the SSI eligibility was not conveyed to AHCCCS." (page 3 final decision, R-546), is absolutely untrue. No such testimony was given.

Equally important, the failure to give notice was also a violation of State Plan and federal statutes and regulations. 42 U.S.C. § 1396a(a)(3) specifically requires the State Plan and AHCCCS to provide hearings when benefits are terminated. 42 C.F.R. § 431.201, and see *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749 (1st Cir. 1983); *Haymons v. Williams*, 795 F.Supp. 1511 (M.D. Fla. 1992).

In the case of both Bradley and Donaldson, no notice was provided so no hearing could take place. The result should be that they both, as a result of the omissions by AHCCCS, should be considered under *Crippen* and *Rodriguez*, to have been categorically eligible at the time of their transplants.

B. The Director erred by not finding that Bradley and Donaldson were qualified severely impaired individuals and thus remained categorically eligible at the time of their transplants.

Persons generally are categorically eligible if they receive SSI or if they receive AFDC. These are the most common bases for categorical eligibility. However, there are others. One in which Bradley and Donaldson clearly fit is that of persons who are "qualified severely impaired individuals."

The statutory sections which authorize the heart and liver transplants needed by Bradley and Donaldson (A.R.S. § 36-2907A(11) and E) allow coverage for those persons eligible pursuant to A.R.S. § 36-2901(4)(b) which in turn refers to 42 U.S.C. § 1396a(a)(10)(A)(i) (I & II) which provides that the state shall make medical assistance available, in addition to others, to all individuals:

> (II) with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter or who are *qualified severely impaired individuals* (as defined in section 1396d(q) of this title, . . . (Emphasis supplied).

42 U.S.C. § 1396d(q) provides:

> (q) Qualified severely impaired individual
>
> The term "qualified severely impaired individual" means and [sic] individual under age 65 –
>
> (1) who for the month preceding the first month to which this subsection applies to such individual –
>
> > (A) received (i) a payment of supplemental security income benefits under section 1382(b) of this title on the basis of blindness or disability, (ii) a supplementary payment under section 1382e of this title or under section 212 of Public Law 93-66 on such basis, (iii) a payment of monthly benefits under section 1382h(a) of this title, or (iv) a supplementary payment under section 1382e(c)(3) of this title, and

(B) was eligible for medical assistance under the State plan approved under this subchapter; and

(2) with respect to whom the Secretary determines that –

(A) the individual continues to be blind or continues to have the disabling physical or mental impairment on the basis of which he was found to be under a disability and, except for his earnings, continues to meet all non-disability-related requirements for eligibility for benefits under subchapter XVI of this chapter,

(B) the income of such individual would not, except for his earnings, be equal to or in excess of the amount which would cause him to be ineligible for payments under section 1382(b) of this title (if he were otherwise eligible for such payments),

(C) the lack of eligibility for benefits under this subchapter would seriously inhibit his ability to continue or obtain employment, and

(D) the individual's earnings are not sufficient to allow him to provide for himself a reasonable equivalent of the benefits under subchapter XVI of this chapter (including any federally administered State supplementary payments), this subchapter, and publicly funded attendant care services (including personal care assistance) that would

> > be available to him in the absence of such earnings.
>
> In the case of an individual who is eligible for medical assistance pursuant to section 1382h(b) of this title in June, 1987, the individual shall be a qualified severely impaired individual for so long as such individual meets the requirements of paragraph (2).

The AHCCCS Director takes the position that in order to have someone declared to be a qualified severely impaired individual they must be so designated by the Social Security Administration. This is ridiculous. It is the Secretary of Health and Human Services who is to make this determination. Obviously, where the regulations call for such determinations to be made under Medicaid, it is at a minimum the duty of the state to give notice to a potentially eligible person and to provide a mechanism whereby the person can avail themselves to the right. Since the handicapped individual cannot obtain a decision from the secretary it is up to AHCCCS to make the determination.

It is AHCCCS who must step into the shoes of the Secretary to make these determinations in the same manner that AHCCCS makes other determinations under the federal Medicaid law as a state Medicaid agency when the law, in form, only calls for the "Secretary's" decision.

Clearly, a qualified severely impaired individual person is categorically eligible. Both Bradley and Donaldson would meet this criteria. They were denied any opportunity to do so. As a result, they should be deemed to have been categorically eligible at the time of their transplants.

C. The Director erred by not finding that since Bradley and Donaldson were in need of transplants during the time they were categorically eligible as a result of receiving SSI, they should have been deemed to remain categorically eligible until they actually received the transplants.

Both Bradley and Donaldson were categorically eligible at the time that it was determined that transplants were medically necessary. A transplant cannot be timed with any precision. It must occur when proper organs are found and matched. This can take weeks, months or longer. In such a case, the protection of the Medicaid statutes and regulations is thwarted when a state is allowed to escape coverage simply because the transplants took place when for no fault of the recipients the state declares them to be still eligible but not to be categorically eligible.

It was merely fate or timing that did not allow the transplants to occur at the time when each were categorically eligible. It was simply because the donor organs were not available. It is arbitrary to require persons who are in need of transplants to play musical chairs over the timing between their eligibility and the availability of an organ. The state legislature has recognized this by enacting corrective legislation.

In Senate Bill 1001, Third Special Session Forty-Second Legislature 1995, the legislature, in § 4, provided guidance as to how persons needing transplants should be treated by providing an exemption to such persons and extending their eligibility for 12 months regardless of changes in their eligibility status. The legislature explained the purpose as follows:

> B. Because a variety of factors affect the scheduling of transplants and delays of many months are common, transplants present a unique problem for persons who ordinarily would have their financial eligibility for government assisted care reevaluated every six months. In order to insure that indigent and needy persons who initially qualified for transplants actually have the opportunity to receive the transplants and are not denied assistance due to factors beyond the control of themselves and the state, the legislature finds that special consideration of extended eligibility is appropriate. Those who would become ineligible for government assisted care before their transplant is accomplished due to the fact they receive income over the maximum income limit could continue to be eligible if they agreed to share in the cost of the transplant by paying the portion of their income that exceeds the eligibility criteria. (S.B. 1001 § 1 B)

The corrective legislation, while not applicable directly, shows clearly, in the Bradley and Donaldson cases, the legislative intent was not to deny their transplant coverage due to changes in their status. They should both be deemed to have been categorically eligible at the time of their transplants.

D. It was erroneous for the Director to assume that Bradley and Donaldson had to be categorically eligible at the time of their transplant rather than at the time they were found to be in need of transplants.

The operative language of the statute in effect at the time that Scott Bradley was unquestionably categorically eligible and in need of a heart transplant states, " . . . the director shall provide medically necessary heart transplants . . . ordered on *prescription* by a physician . . . " A.R.S. § 36-2907E. (Emphasis supplied).

The operative language applicable to Robert Donaldson's liver transplant when he was unquestionably categorically eligible provided the same verbiage except that it unlawfully restricted liver transplants to those under age 21 which was struck down in *Salgado*.

The state statute does not limit a transplant to persons deemed categorically eligible at the time of the transplant. The statute requires only that it be prescribed by a physician. In both cases at the time that they were categorically eligible, Bradley's physician prescribed a heart transplant and Donaldson's physician prescribed a liver transplant.

Thus, the time that the procedure was prescribed rather than the time that the transplant was received is the proper time to determine whether a person is categorically eligible and since Bradley and Donaldson were so eligible, AHCCCS should have covered the transplants.

E. The effect of the Director's overlooking the erroneous May, 1994 denial of Donaldson's request for a liver transplant when he was categorically eligible was error.

It is clear from the record that when Robert Donaldson's transplant was denied by University Famli-Care on May 5, 1994, he was categorically eligible. (Compare R-297 with R-291). This denial was unlawful. The AHCCCS Director simply ignores this fact.

However, it cannot be ignored because he was in fact eligible, and had his doctor received the go-ahead in May of 1994, Donaldson could have in all likelihood been transplanted within a few weeks or months while he was still categorically eligible.

AHCCCS, through its contractor prevented this from happening. AHCCCS should be held accountable by requiring it to pay for his liver transplant.

F. The Director erred by not finding that Bradley, Donaldson, and Bravo, were, as persons who were MN/MI eligible at the time of their transplants, "similarly situated" to other persons who were categorically eligible transplant recipients.

42 U.S.C. § 1396b(i) requires that State Plans treat similarly situated individuals in need of transplants, the same. "Similarly situated" means: "All patients who can te [sic] treated effectively by the same organ transplant procedure." *Dexter v. Kirschner*, 972 F.2d 1113, 1120 (9th Cir. 1992); *Salgado v. Kirschner*, 179 Ariz. 301, 306, 878 P.2d 659 (1994).

Scott Bradley and Mary Bravo are within the class of persons who could be effectively treated with a heart transplant. Robert Donaldson is within the class of persons who could be effectively treated with a liver transplant. To the extent that the State Plan as reflected in A.R.S. § 36-2907 attempts to exclude Bradley, Bravo, and Donaldson simply because they are MN/MI eligible and not categorically eligible, it violates 42 U.S.C. § 1396b(i).

There were two prongs to the *Salgado* decision: First, all similarly situated persons must be treated alike; and second, that creating unreasonable classifications (there [sic] age, here eligibility status) is arbitrary and capricious.

In *Salgado* the EPSDT program was raised as a defense by AHCCCS to attempt to justify allowing liver transplants for children but not for adults. Prior to that, AHCCCS had unsuccessfully attempted to categorize transplants as experimental for adults but not for children. *Brillo v. Schaller*, Case No. 233587, Pima County Superior Court, June 13, 1986. Now AHCCCS tries to justify transplants for categoricals but not MN/MI.

Once again, the unreasonableness of the AHCCCS position has been recognized, this time by the legislature which has removed the artificial barrier of no transplant coverage unless categorically eligible. See, A.R.S. § 36-2907A(11) (as amended October 17, 1995 and not applicable to this case).

None of these artificial barriers have been allowed to stand because they cannot meet the similarly situated standard which is based upon the need for the same type of transplant. Bradley, Bravo, and Donaldson as MN/MI

AHCCCS eligible were all similarly situated to categorically AHCCCS eligible persons who were in need of the same type of organ transplants. They must be so considered and any other conclusions violates the principles declared in *Salgado* and in *Dexter*.

Clearly, the *Salgado* and *Dexter* decisions control this issue. The outcome here must be the same. These transplants must be covered because they are similarly situated.

G. The Director erred by not finding that Bradley and Donaldson who were considered not categorically eligible on the actual day of their transplants but were previously categorically eligible, were "similarly situated" to categorically eligible persons who are eligible on the actual day of transplantation.

Even if one were to take the AHCCCS view that a categorically eligible person is not similarly situated to an MN/MI eligible person who needs the exact same medical procedure, it is impossible to put Bradley and Donaldson into such a mold because they were categorically eligible when they were told they needed to have organ transplants.

Certainly under the definitions of similarly situated in *Salgado* and *Dexter*, such persons who need the same type of transplant who are categorically eligible when they are prescribed the transplant are similarly situated to persons who are categorically eligible for the same procedures on the day the procedures are performed.

H. The Director erred by not finding that it is unreasonable, arbitrary, and capricious to use categorical eligibility as a standard because it has no relation to need for a transplant.

As the *Salgado* decision pointed out: " . . . once a state adopts a policy to cover a *category* of organ transplants, it may not be arbitrarily or unreasonably deny services to *an otherwise eligible* Medicaid recipient." (emphasis added). MN/MI eligible persons are otherwise eligible Medicaid recipients.

It is unreasonable to set standards that have nothing to do with need. Here, the need is organ transplantation to avoid certain death. It is the only treatment available. In *Salgado*, the court pointed out that unreasonable distinctions may not be made to deny life sustaining services. There, it was an age distinction that was unreasonable. Here, it is a status distinction.

Here, each party became eligible, ineligible, then the process repeated. For a while, Bradley and Donaldson are categorically eligible, then they are not. Eligibility bounces back and forth like a yo-yo, but nothing really changed for the parties involved. They merely became the victims of being named categorical or MN/MI. It was an artificial distinction and clearly unreasonable. As a result, the reasonableness test recognized in *Dexter* and *Salgado* has been violated.

I. The Director erred by failing to find that allowing transplant coverage to persons who are categorically eligible and denying it to persons who are eligible on the basis of medical need and indigency, violates the Privileges and Immunities provision of the state constitution and the equal protection provisions of the U. S. Constitution.

Article 2, § 13 of the Arizona Constitution says:

> No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

The Arizona Constitution does not allow the legislature to enact and maintain a law which favors one citizen or class of citizens and discriminates against another citizen. A.R.S. § 36-2907 unfortunately does exactly what Art. 2, § 13 says a law should not do. The statute confers the privilege of a life sustaining organ transplant to one class of citizens, those categorically eligible, and withholds the privilege from those who, because of contrived circumstances, cannot belong to the favored class because they are MN/MI eligible.

The question under the Arizona equal protection clause is not whether the state has a rationale for passing such a law, but rather whether the law in fact discriminates between citizens. Here, the answer is crystal clear that the offending statute discriminates against every AHCCCS non-categorically eligible citizen in this state who needs an organ transplant to survive unless that citizen has the good fortune to be categorically eligible at the precise time an organ is available. It does not make the law any less discriminatory by finding an excuse for the law and then calling that excuse a rational basis.

In *Dews v. Henry*, 297 F.Supp. 587 (1969), a three judge district court panel found that a statute enacted to cap welfare payments at the level of three recipients regardless of how many more persons might be in a family, violated equal protection as well as the Social Security Act. The court analyzed the state's attempt to save money as follows:

> "There seems to be no purpose served by the Arizona Statutes save to fit the needs of the State's dependent children into the State's inadequate appropriations. Discrimination of this type not to run afoul of the equal protection clause of the Fourteenth Amendment must be founded on reason in light of its purpose." *Dews*, at 592.

Here, AHCCCS attempts to artificially require a particular type of eligibility for no reason. The federal government will reimburse expenditures regardless of the label that is used.

The analysis to be undertaken in this case is suggested in a more contemporary case. In *Baresma v. Susong*, 156 Ariz. 309, 751 P.2d 969 (1988), the issue of concern was a statute passed as part of the Medical Malpractice Act of 1976, which precluded any evidence in a malpractice action that a witness was insured or had a financial interest in MICA. The statute went beyond the Rules of Evidence limitations and conflicted with the Rules. The opinion states:

> "Our evidentiary rules cannot be modified to accord special treatment to medical malpractice

> defendants insured by MICA as opposed to tort and medical malpractice defendants generally. art. 2, § 13; art 4, pt. 2 § 19(13)." *Baresma*, at 314.

The problem in *Baresma* was that the statute conferred a benefit upon a few, those defendants insured by MICA as opposed to discriminating against a substantially greater number of persons who were otherwise insured by not conferring the same advantage upon them. The line was drawn at a point where the statute favored only a few without providing the same benefit to the greater number. The same result occurred in the instant case. The line was drawn at a point where only a few can receive the privilege of an organ transplant and the majority of persons who need such a life saving privilege are excluded. It is this type of line drawing that art. 2, § 13 was enacted to prohibit.

This case may also be decided under the U. S. Constitution Fourteenth Amendment equal protection clause by applying the rational basis test. The statute creates two classes of persons in need of a liver or heart transplant. The classes are identical except for labels categorically eligible vs. MN/MI eligible. Such a classification can only be sustained under the Fourteenth Amendment if it rests upon a rational basis. It does not. A state subjects itself to scrutiny under the equal protection clause of the Fourteenth Amendment when it distributes benefits unequally. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 617, 105 S.Ct. 2862, 2866, 86 L.Ed.2d 487 (1985).

Here, the benefits are organ transplants distributed unequally based upon eligibility status. In *Hooper*, the line was irrationally drawn between Vietnam Veterans who resided in New Mexico before May 8, 1976, who received the exemption and those who established residency after that date who were not entitled to the exemption. 105 S.Ct. at 2865. The *Hooper* majority could find no rational reason for the classification and found the statute violated equal protection. 105 S.Ct. at 2869.

Similarly, the classification here has no rational explanation. It is just based upon an artificial class. That is all. In Arizona, governmental regulations or benefits that allow special treatment to only a few while denying it to others in similar situations cannot be tolerated.

In the history of the AHCCCS program, only a handful of persons have been allowed organ transplants because they were categorically eligible, while a far greater class who were MN/MI eligible have been denied these life saving procedures. This kind of life denying discrimination is prohibited under any concept of equal protection under the law.

J. The Director erred by finding that Donaldson and Bravo were only eligible for Emergency Services and concluding that they were subject to the "sudden onset" rule.

The Director concluded that Bravo and Donaldson were only eligible for emergency services and that their conditions were not a result of a sudden onset, thus the transplants would not be covered even if transplants were allowed for persons MN/MI eligible. The Director's conclusion is contrary both to the facts and the law.

The spendown [sic] for eligibility occurs when the expense is incurred, not a few days later. *Maricopa County* *v. AHCCCS*, 179 Ariz. 508, 511, 880 P.2d 728 (Az. App. 1994). According to the foregoing case, the eligibility for Donaldson began on January 24, 1995, and for Bravo on November 23, 1994.

AHCCCS's attempts to interpose a waiting period for MN/MI eligibility not imposed for categorical eligibility also violates 42 U.S.C. § 1396a(a)(10)(c)(i) which requires that the same methodology be utilized for eligibility determination for categorical and medically needy categories. And see, *Estate of Greer v. Chen, et al.*, Slip Opinion, No. CIV. 93-1901 Phx RCB (U.S. Dist. Court Arizona 3-27-95).

Dr. Seifert, an eminently qualified physician who, among a multitude of other credits, is Board Certified in Emergency Medicine testified at the hearing (R-65-100). It was his opinion at the hearing that even if the eligibility determination is artificially delayed which would invoke the emergency services provision related to Donaldson and Bravo, the circumstances of an organ transplant meet the emergency criteria. There is no evidence in the record to the contrary.

More importantly, the "sudden onset" rule relied upon by the Director has been declared invalid by Division 1 Department D of the Arizona Court of Appeals. *Arizona Health Care Cost Containment System Administration v. Carondelet Health System*, 1996 WL 408702, ICA-CV 93-0175 and ICA-CV 93-0335.

Any rule that delays eligibility dates to other than the actual date that the spendown [sic] is achieved is likewise invalid, unreasonable, arbitrary, and capricious.

The entire emergency coverage argument on the part of AHCCCS is a red herring. It is not central to the issues regarding AHCCCS's responsibility for payment of the organ transplants sought here. Donaldson was actually categorically eligible when he was denied transplant coverage. Bravo had been previously determined eligible as MN/MI when she was denied transplant coverage. The point then is the denial of coverage. If the denials were wrong, which they were, the eligibility status at the time of the transplants was irrelevant.

V

CONCLUSION

AHCCCS continues to create artificial barriers to attempt to avoid paying the costs of organ transplants. The barrier here is the guise that categorical eligibility status must exist to be eligible for organ transplant coverage. This distinction cannot survive the scrutiny of the reasonableness test and treats those who are similarly situated differently. As a result, the federal Medicaid laws and regulations and the Arizona and U. S. Constitution are violated.

Moreover, Bradley and Donaldson should be considered to have been within the artificial rubric of categorical eligibility because AHCCCS failed to give them notice of a right to appeal, and failed to notify them that they could be determined to be qualified severely impaired individuals. In fact, both Bradley and Donaldson fully met the criteria required to be labeled as qualified severely impaired individuals. Just as importantly, they both were categorically eligible at the time it was medically determined that a transplant was the only medically appropriate procedure to sustain their lives. AHCCCS should have continued to have deemed Bradley and Donaldson categorically eligible upon four separate grounds: One, the failure of notice resulted in their continuing to be categorically eligible; Two, they both were qualified severely impaired individuals and thus remained categorically eligible; Three, their categorical status should have been extended a reasonable length of time after they were determined to be in need of organ transplants; and Four, their categorical status was required to be determined when they were prescribed the need for their transplants, not when they received them.

Finally, the timing of the eligibility determination where a financial spendown [sic] is required must be simultaneous with the incurrence of the expense. AHCCCS policy to the contrary is invalid because it is unreasonable and hence arbitrary and capricious.

It should be remembered that in the case of each one of the individuals involved here, the only reason that they could not continue to be categorically eligible, or in Mary Bravo's case could not receive SSI, was that they all had working/wage earning histories which required them to apply for and accept SSD. These are all persons who have contributed to both Medicaid and Medicare with their taxes.

Can they be deemed to not be eligible while someone who has contributed nothing is eligible? Congress did not intend a state program to produce this kind of result and this court should set aside the invalid decision of the Director of AHCCCS and order these transplants covered.

Respectfully submitted this 11th day of February, 1997.

/s/ Howard Baldwin
HOWARD BALDWIN,
ATTORNEY
for Pima County, S. Bradley,
R. Donaldson, and M. Bravo.

I hereby certify that a copy of the foregoing mailed/ delivered on February 11, 1997, to:

(Mailed)
Michael D. Curran, Exq. [sic]
Johnston, Maynard, Grant & Parker
3200 N. Central Ave., #2300
Phoenix, AZ 85012-2443

/s/ Howard Baldwin

IN THE SUPREME COURT
STATE OF ARIZONA

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON; PIMA COUNTY, ARIZONA, a body politic, Plaintiffs/Appellees/ Cross-Appellants, vs. JOHN H. KELLY, in his capacity as Director of Arizona Health Care Cost Containment System; and THE STATE OF ARIZONA, Defendants/Appellants, Cross-Appellees.	Case No.: 1 CA-CV-98-0311 (Maricopa County Superior Court No. CV96-21041)

APPELLEES' PETITION FOR REVIEW

HOWARD BALDWIN
22 East University Boulevard
Tucson, Arizona 85705-7737
Attorney for Plaintiffs/Appellees/
Cross-Appellants

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 2

Issues Decided by Court of Appeals 2

Issues Not Decided by Court of Appeals 2

STATEMENT OF FACTS 3

A. Scott Bradley 3

B. Robert Donaldson 5

C. Mary Bravo 6

D. Facts Common to All Three Cases 6

REASONS FOR GRANTING PETITION 7

ARGUMENT 8

The Court of Appeals Improperly Decided the Issue Regarding the Failure to Provide the JASSO Notice 8

The Court of Appeals Improperly Concluded Bravo Was Not Similarly Situated to a Person Categorically Eligible 11

The Court of Appeals Erred by Failing to Consider and Rule Upon the Other Eight Issues Raised by Plaintiffs 11

CONCLUSION 12

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed. 661 (1985) 11

Crippen v. Kheder, 741 F.2d 102 (6th Cir. 1984) 8

Goldberg v. Kelly, 397, U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) 8

Granato v. Bane, 74 F.3d 406 (2nd Cir. 1996) 9

Hart v. Bayless Inv. & Trading Co., 86 Ariz. 379, 346 P.2d 1101 (Ariz. 379) 9

Perry v. Chen, 985 F.Supp. 1197 (D.AZ. 1996) 9

Rodriquez v. Chen, 985 F.Supp. 1189 (D.AZ. 1996) 9

Salgado v. Kirschner, 179 Ariz. 301, 878 P.2d 659 (1994), *(en banc) cert. denied* 513 U.S. 1151 (1995) 1, 8, 11

Schweiker v. Hogan, 457 U.S. 569, 102 S. Ct. 2597, 73 L.Ed. 2d 227 (1982) 11

Statutes, Rules and Regulations:

Page(s):

A.A.C. R9-22-341 . . . . 4, 5

42 C.F.R. 435.902 8

42 U.S.C. § 1396b(i) 12

42 U.S.C. § 1396d(q) 5, 10

INTRODUCTION

This Court should accept review not only because Judge O'Melia's decision in favor of the Petitioners was just, proper and must be reinstated, but also because AHCCCS must be made to understand that there are significant consequences if proper and meaningful notice of termination of benefits and right of appeal are not given as required by law (the JASSO notice[1]).

This case involves the denials of heart transplants to Scott Bradley and Mary Bravo, and the denial of a liver transplant to Robert Donaldson, three persons who would have died had Pima County not intervened. Judge O'Melia reversed the AHCCCS denial and the Court of Appeals reversed Judge O'Melia.

Bradley and Donaldson were categorically eligible when it was determined they needed transplants. Mary Bravo was not because she was awarded SSD instead of SSI. All three were physically disabled and unable to work.

AHCCCS should have deemed Bradley and Donaldson to continue to be categorically eligible upon four separate grounds: one, the failure to give the JASSO notice resulted in their continuing to be categorically eligible; two, they both were qualified severely impaired individuals and thus remained categorically eligible; three, their categorical status should have been extended a reasonable length of time after they were determined to be in need of organ transplants; and four, their categorical status was required to be determined when they were prescribed the need for their transplants, not when they received them. Mary Bravo was similarly situated to a categorically eligible person needing a heart transplant.

---

[1] Surprisingly, JASSO is not an acronym but rather the last name of a person who lobbied for the federal law that requires the notice.

The stubborn persistence of AHCCCS to fight at all costs the providing of organ transplants to eligible persons has been mollified by actions of this court in the *Salgado* case, and the legislature by making available almost all types of transplants to those persons eligible for AHCCCS coverage.

Time and actual experience has also laid to rest the standard AHCCCS defense and wrongly perceived fear that transplants will bankrupt the system. Time has taught that the actual number of persons who can benefit from organ transplants represents a very small population and is not costly to manage. The limited availability of organs has also exercised a silent control over the numbers of transplants. The cost of transplants is proving to be more economical than the health care costs associated with persons dying from organ diseases who are not aided by a transplant. Thus, in the long run, an economy is reached by favoring transplants.

In this case, however, AHCCCS continues to create artificial barriers to attempt to avoid paying the costs of organ transplants. The barrier here is the guise that categorical eligibility status must be played out like a game of Russian roulette to be eligible for organ transplant coverage. This barrier cannot survive the application of JASSO notice requirements. Nor can it pass the scrutiny of the reasonableness test and it treats those who are similarly situated differently. As a result, the federal Medicaid laws and regulations, Arizona Statutes and regulations, and the Arizona and U. S. Constitutions are violated.

ISSUES PRESENTED FOR REVIEW

Issues Decided by Court of Appeals.

1. Did the trial court properly find that the AHCCCS decision to deny transplant coverage was invalid based upon the fact that Bradley and Donaldson continued to be categorically eligible because they were not given the required JASSO notices?

2. Did the trial court properly find that Mary Bravo was similarly situated to other persons who were eligible for transplants, thus she should have been eligible as well?

Issues Not Decided by Court of Appeals.

1. Did the Director err by not finding that Bradley and Donaldson were qualified severely impaired individuals and thus remained categorically eligible at the time of their transplants?

2. Did the Director err by not finding that since Bradley and Donaldson were in need of transplants during the time they were categorically eligible as a result of receiving SSI, they should have been deemed to remain categorically eligible until they actually received transplants?

3. Was it erroneous for the Director to assume that Bradley and Donaldson had to be

categorically eligible at the time of their transplants rather than at the time they were found to be in need of transplants?

4. What is the effect of the Director's overlooking the erroneous May 1994 denial of Donaldson's request for a liver transplant when he was categorically eligible?

5. Did the Director err by not finding that it is unreasonable, arbitrary and capricious to use categorical eligibility as a standard because it has no relation to need for a transplant?

6. Did the Director err by failing to find that allowing transplant coverage to persons who are categorically eligible and denying it to persons who are eligible on the basis of medical need and indigency, violates the Privileges and Immunities provision of the Arizona Constitution and the equal protection provisions of the U. S. Constitution?

7. Did the Director err by finding that Donaldson and Bravo were only eligible for Emergency Services and concluding that they were subject to the "sudden onset" rule?

8. Did the trial court err in denying Plaintiffs below their attorney fees?

STATEMENT OF FACTS[2]

The facts adduced at the April 2, 1996 hearing on this matter before AHCCCS relevant to this Petition establish the following: ("R" is used to denote the two volume administrative hearing record.)

---

[2] A complete fact statement is included in Appendix 1.

A. Scott Bradley:

On February 15, 1993, Scott Bradley, born June 7, 1952, then age 40, was diagnosed as having a terminal heart condition known as idiopathic cardiomyopathy, thought to have been caused by a viral infection. His condition was so severe that only a heart transplant would sustain his life. (R-242-245)

Scott Bradley could no longer work, and he and his family became eligible for Aid to Families with Dependent Children (AFDC). (R-275) Also, as a result of receiving the AFDC, he became categorically (mandatorily) eligible for AHCCCS coverage effective March 1, 1993. (R-106 and R-275)

On Sept. 2, 1993, he was found eligible for SSI payments retroactive as of March 1993. (R-110 and R-276-281) At the same time, for purposes of SSD, he was determined to be disabled and unable to work as of February 14, 1993. His entitlement for SSD began as of August 1993 and he could not refuse the payment in order to maintain his eligibility for AFDC or SSI. (R-282 and R-153)

His monthly income from SSD, based upon his previous payments into Social Security, was $701.00 per month. This resulted in his eligibility for SSI and AFDC being terminated as of August 1993 because the payments received from SSD caused him to be over the allowable income limits. As a result, he also lost his categorical/mandatorily eligible status for AHCCCS coverage. (R-116 and R-183-187) He had no other income. (R-183-187)

AHCCCS was required by its regulations, the State Plan, and federal law to notify Scott Bradley in writing, by means of a JASSO notice, of his loss of categorical eligibility (A.A.C. R9-22-341) and it failed to do so. AHCCCS also failed to notify Scott Bradley of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual". (R-155-156)

In spite of foregoing, Scott Bradley applied for AHCCCS coverage as an MN/MI person. By "spending down", Scott Bradley was able to attain his eligibility for AHCCCS as a medically needy/medically indigent (MN/MI) person and he was so eligible when he received his heart transplant on January 24, 1995. (R-114)

A Pima County Attorney, Michael Callahan, in approximately mid-1994, contacted AHCCCS in an attempt to determine how a person such as Scott Bradley could be classified by AHCCCS to be a qualified severely impaired individual pursuant to 42 U.S.C. 139d(q). He was told AHCCCS had no process for making such a decision. (R-407)

B. Robert Donaldson:

Robert Donaldson was born December 21, 1956. (R-259) At the time of the liver transplant, he was a 38 year old divorced person, parent of three children. He was diagnosed as having a fatal liver disease in 1993. (R-259-262)

Robert Donaldson has worked most of his adult life and prior to his illness. He was employed as a maintenance technician for an automobile rental agency. He became unable to work because of his liver disease in approximately 1993. (R-259-262)

He first became AHCCCS eligible September 1, 1993 as an MN/MI. He became categorically/mandatorily eligible when he became eligible for SSI payments on May 1, 1994. (R-188-190 and R-291)

As a result of receiving SSD, he became ineligible beginning November 1, 1994 for categorical coverage. (R-293) He had no other income. (R-188-190)

AHCCCS was required by its regulations, the State Plan, and federal law to notify Robert Donaldson in writing, by means of a JASSO notice, of his loss of categorical eligibility (A.A.C. R9-22-341), and it failed to do so. AHCCCS also failed to notify him of his right to appeal the termination of categorical status and failed to notify him of ways in which to continue his categorical eligibility as a "qualified severely impaired individual." (R-155-156)

In spite of the foregoing, Robert Donaldson reapplied as an MN/MI and as a result of spendown [sic] which occurred on January 24, 1995, he was again MN/MI eligible as of January 24, 1995. (R-121 and R-188-190)

Robert Donaldson and his physician, Lane Johnson, M. D., first requested a transplant in May 1994, and was denied by his AHCCCS provider, University Famli-Care on May 5, 1994, which was erroneous because he was in fact categorically eligible at the time. (R-297) His second request for a liver transplant was denied by his subsequent AHCCCS provider, Cigna Community Choice, on

February 10, 1995, because he was not categorically eligible. (R-298)

Pima County authorized coverage for a liver transplant on August 16, 1994, during which time he was also categorically eligible. (R-188-190 and R-264)

C. Mary Bravo:

Mary Bravo, a married woman, was born July 2, 1935, and was found to be disabled for purposes of Social Security Disability payments retroactive to February 2, 1993. Prior to that time, she had worked as a club manager for American Legion. (R-299)

On May 25, 1994, her AHCCCS provider, Health Choice Plan, denied coverage on the basis that she was not categorically eligible. (R-307) Mary Bravo originally became eligible for MN/MI AHCCCS status January 1994. Mary Bravo had applied for SSI benefits, but was determined not to be eligible because of family income. She was determined to be eligible for SSD because she was a wage earner. After receiving the SSD benefits, she became ineligible, but further medical expenses made her MN/MI eligible again at the time of the transplant as a result of spending down. She received a heart transplant at University Medical Center on November 23, 1994 and again became MN/MI AHCCCS eligible at the time. (R-41 and R-240-241)

D. Facts Common to All Three Cases:

Scott Bradley, Robert Donaldson, and Mary Bravo were all recipients of SSD at the time of their transplants.

Persons who are eligible for SSD are also eligible for Medicare which would cover the transplants. However, Medicare does not become effective until the expiration of two years from the initial receipt of SSD. (R-154)

A person is determined to be eligible for SSD based upon past earning of wages. The amount of past wages also determines the amount of SSD that will be paid. (R-155)

Scott Bradley, Robert Donaldson, and Mary Bravo could not refuse the SSD in order to continue to receive SSI or to establish or preserve their status of being categorically eligible for Medicaid. (R-153-154)

Each of the three transplants was medically necessary. (R-70) The period of time between when a person needs an organ transplant and can actually receive one is conditioned upon the availability of an organ and an adequate physiological condition to receive the transplant. (R-86-88) Throughout this time period a person is in immediate and emergent need of a transplant. (R-86 and R-308)

REASONS FOR GRANTING PETITION

Clearly, the most compelling reason that this Court must review this case is that the Court of Appeals has incorrectly decided an issue of law. The Court of Appeals has decided that there are no consequences attached to the failure of AHCCCS to give the required JASSO notices. Such a decision cannot be allowed to stand because it is contrary to law.

Other equally important issues of law have been wrongly decided by the Court of Appeals. The result is that there are several cogent reasons why this Court should accept review. Foremost is that there is not adequate case law to guide the lower courts as to the consequences of not providing adequate notice of the appeal rights involved when important health benefits are terminated by AHCCCS. Here that fact is dramatically illustrated by the Court of Appeals erroneously concluding that the persons whose rights were denied must first prove that had they been notified of an appeal right that they would have won the appeal!

This case needs to be reviewed and decided in such a manner that it will be clear to AHCCCS that if life saving procedures are to be denied, persons subject to the denial must be provided a JASSO notice. They must be provided all available information and means to an appeal to attempt to preserve their status, and thus their very lives. Medicare regulation requires that the policies of an agency such as AHCCCS must ensure that eligibility is determined in a manner consistent with the best interests of the recipient. 42 C.F.R. 435.902 (see Appendix 6).

This case is also a fine vehicle to utilize to extend the application of the *Salgado* case. A MN/MI eligible person who is in need of a particular transplant, is identically situated, and is indeed similarly situated to a categorically eligible person, who has the same need. Artificial notions of the basis for eligibility should not be allowed to deny this self-evident truth.

Lastly, a compelling reason to review this case is the opportunity to visit the privileges and immunities protection of the Arizona Constitution and demonstrate that its coverage is indeed broader than that of equal protection. There can be no better context in which to do that than that of health care to those whose lives are in jeopardy and must deal with a system that puts unconstitutional barriers in their paths.

ARGUMENT

The Court of Appeals Improperly Decided the Issue Regarding the Failure to Provide the JASSO Notice.

The great flaw in the Court of Appeals opinion is that while it recognizes a blatant violation of due process because the required JASSO notices were not given, it fails to attach any consequences to the violation. There must be consequences, otherwise the right to proper notice and an appeal is meaningless. The consequence here is continuing categorical eligibility for Bradley and Donaldson.

The Court of Appeals rejected the *Crippen v. Khedar*, 741 F.2d 102 (6th Cir. 1984) case because the *Crippen* case held that the duty of a Medicaid agency upon termination of SSI benefits is to make an *ex parte* determination of MN/MI coverage. The Court of Appeals neglected to look more closely at the principles that underlie *Crippen* and totally ignores the other cases cited by the Appellees. The U. S. Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), set the standard that due process requires meaningful notice prior to termination of health care benefits. *Granato V. Bane*, 74 F.3d 406

(2nd Cir. 1996), established the recognition that the Medicaid regulations themselves require notice and hearing before benefits may be terminated and further requires the benefits to continue until the conclusion of a hearing.

AHCCCS has a history of being sloppy about notices. AHCCCS has been brought to court several times because AHCCCS failed to give proper notices like the JASSO notice here in other contexts. For two of those decisions finding such failures to violate the federal statutes and due process, see, *Perry v. Chen*, 985 F.Supp. 1197 (D.AZ. 1996); *Rodriquez v. Chen*, 985 F.Supp. 1189 (D.AZ. 1996). (For the various federal regulations and state statute requiring notice and hearing, see Appendix 4.)

In this case there was no notice whatsoever, thus no hearing. As a result, under the federal regulations, the status of categorical eligibility continues.

In *Granato*, the court stated the requirements as follows:

> The state agency must provide each recipient with adequate and timely notice when it takes "any action affecting his or her claim." 42 C.F.R. § 431.206(c)(2) (1994). "Action" is defined as "a termination, suspension, or reduction of Medicaid eligibility or covered services." 42 C.F.R. § 431.201 (1994). *Granato* at 408.

The court continued:

> If the recipient requests a hearing before the date of a proposed action, "the agency may not terminate or reduce services until a decision is rendered after the hearing,' except under narrowly prescribed circumstances. 42 C.F.R. § 431.230(a) (1994) *Granato* at 406. (Also see

Appendix 4 for the CFRs and regulations requiring notice and hearing.)

Actions taken without proper notice and hearing are void. *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 346 P.2d 1101 (Ariz. 379). Here the failure to give the required JASSO notice means the action removing the categorical status was void. If the action was void, the categorical status continued.

The Court of Appeals also apparently believed that Bradley and Donaldson could not prove their status as qualified severely impaired persons. It was wrong because the proof is in the record.

AHCCCS seriously misled the Court of Appeals as to this issue. AHCCCS contended, erroneously, in its reply brief that there was no evidence that Bradley and Donaldson could meet the requirement of qualified severely impaired individuals[3]. Apparently AHCCCS' position was wrongly followed by the Court of Appeals. That should not have occurred because the record is replete with proof that both Bradley and Donaldson met the requirements as qualified severely impaired persons, and as such would have continued to be categorically eligible.[4]

---

[3] It should also be noted that AHCCCS argued and the Court of Appeals wrongly agreed that two of the total issues raised were not raised at the administrative level. They do not say which issues. However, that is not true. It is clear in the records that all issues raised in the Superior Court had previously been raised either in the hearing, in the post hearing memorandum, or in the Request for Rehearing. (Please refer to the Appendix filed herewith.)

42 U.S.C. § 1396d(q) (see Appendix 5) requires that to be a qualified severely impaired individual one must: (1) be under age 65; (2) have received SSI; (3) be eligible under a state Medicaid plan; (4) continue to be disabled and meet all eligibility requirements except that the earnings are too high; (5) the lack of benefits seriously inhibits the ability to obtain employment, and, (6) the earnings are not enough to provide the equivalent medical benefits.

The evidence is in the record. (See Fact Statement herein and the separate Appendix) Each was under age 65. Both Bradley and Donaldson received SSI payments. Each continued to have the same disabling physical impairment on the same basis that they originally were found to be disabled. Each, except for their earnings from SSD, continued to meet all non-disability related requirements for disability. Their lack of medical benefits seriously inhibited their ability to obtain employment. Their earnings were insufficient to provide the reasonable equivalent of the medical benefits. Bradley and Donaldson met each requirement to be determined as qualified severely impaired individuals and the record of this case provides uncontroverted and unequivocal evidence of such.

---

[4] Whether the State makes the determination or whether the Commissioner of Social Security makes it is irrelevant. The point is that AHCCCS had the duty to advise Petitioners of the right to appeal and the available options. One of which was to seek "qualified severely impaired" status. This AHCCCS did not do. It is not up to the Petitioners to prove they could qualify after the fact.

The Court of Appeals Improperly Concluded Bravo Was Not Similarly Situated to a Person Categorically Eligible.

The Court of Appeals was wrong in determining that Mary Bravo was not similarly situated. The Court of Appeals rejected *Salgado v. Kirschner* and instead relied upon an inapplicable U.S. Supreme Court decision, *Schweiker v. Hogan*, 457 U.S. 569, 102 S. Ct. 2597, 73 L.Ed. 2d 227 (1982).[5]

The "similarly situated" standard for transplants is based upon federal statutory law, not the Constitution. Moreover, much water has passed under the bridge since *Schweiker*, making it wholly inapplicable to this case. *Schweiker* involved a constitutional challenge to § 10-3(f) of the Social Security Act which centered upon the method of computing eligibility. *Schweiker* simply upheld the constitutionality of the federal statute and the notion that states can provide for the categorically eligible and not provide for the medically needy. However, that notion has long been supplanted by the principle that when the state undertakes to cover a category of care that is not mandatory, it must do so in a manner that fully complies with federal regulations and statutory law.

The first case to announce the foregoing principle three years after *Schweiker* was *Alexander v. Choate*, 469

---

[5] *Schweiker* was decided approximately four years prior when Congress adopted the "similarly situated" standard for transplants contained in 42 U.S.C. § 1396 b(i).

U.S. 287, 289n1, 105 S.Ct. 712, 714 n1, 83 L.Ed. 661 (1985). *Schweiker* is not the law that applies to this case. The Court of Appeals was wrong.

The Court of Appeals Erred by Failing to Consider and Rule Upon the Other Eight Issues Raised by Plaintiffs.

The Court of Appeals could have sustained Judge O'Melia's decision by ruling affirmatively on any of the other cross issues raised by Petitioners. Because of page limitations, Petitioners will expand upon those issues in the brief before this Court when the Petition for Review is granted.

Conclusion

This is a case where AHCCCS once again failed to take notice and hearing requirements seriously. There were no JASSO notices given by AHCCCS. There must be a consequence. That consequence is that Bradley and Donaldson were categorically eligible. AHCCCS has not acted in the best interests of these recipients.

Under § 42 U.S.C. § 1396 b(i), Bravo was a person similarly situated to a categorically eligible person. She must therefore be eligible as well.

This court should accept review and reinstate Judge O'Melia's judgement and award the Petitioners' their attorney fees.

Submitted this 25th day of March, 1999.

/s/ Howard Baldwin
Howard Baldwin,
Attorney for Petitioners
22 East University Boulevard
Tucson, AZ 85705-7737

Supreme Court, U.S.
FILED
DEC 29 1999
CLERK

No. 99-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SCOTT BRADLEY; MARY BRAVO; ROBERT DONALDSON;
PIMA COUNTY, ARIZONA, a body politic,

Petitioners,

v.

JOHN H. KELLY, in his capacity as Director of Arizona Health
Care Cost Containment System; and THE STATE OF ARIZONA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF ARIZONA,
DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Logan T. Johnston
(Counsel of Record for Respondents)
Anne C. Longo
JOHNSTON & DODD, P.L.C.
One North First Street, Suite 700
Phoenix, AZ 85004
(602) 452- 0600/Fax. (602) 716-5997
Attorneys for Respondents

Wright Appellate Services 1214
(215) 733-9870 ● (800) 507-9020 ● Fax (215) 733-9872

BEST AVAILABLE COPY

I. QUESTIONS PRESENTED

1. Whether Bradley and Donaldson were properly denied coverage for their transplants by the Arizona Health Care Cost Containment System ("AHCCCS") because they were not categorically eligible at the time of their transplants, because they received notice of termination of their SSI benefits but did not appeal to the Social Security Administration, and because AHCCCS is not authorized to make determinations of federal categorical eligibility?

2. Whether Bravo was properly denied coverage of her transplant because she was never categorically eligible, and as a state MN/MI (medically needy/medically indigent) person, was not similarly situated to a categorically eligible person?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS...ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES,
AND REGULATIONS INVOLVED.......................................1

STATEMENT OF THE CASE 4

- Bradley...5
- Donaldson 6
- Bravo...7

ARGUMENT 8

- A. Reasons For Denying the Petition.........................8
- B. Misstatements of Fact and Law in the Petition.....9
- C. Bradley and Donaldson Did Receive Notice of their Appeal Rights.. 10
- D. The Court of Appeals Properly Found Bravo Not "Similarly Situated" to Categorically Eligible Recipients 16

CONCLUSION..19

TABLE OF AUTHORITIES

Page

CASES:

Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992) ... 16, 17

Disabled Rights Union v. Kizer, 744 F.Supp. 221 (C.D.Cal. 1990) ... 14

People ex rel. Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir. 1989) ... 16

Salgado v. Kirschner, 179 Ariz. 301, 878 P.2d 659 (1994) ... 16, 17

CONSTITUTION, STATUTES, and REGULATIONS:

Federal:

28 U.S.C. § 1257(a) ... 1

42 U.S.C.S. § 1396b(i) ... 15, 16

42 U.S.C.S. § 1396(d)(q)(2)(1993) ... 1, 10

42 U.S.C.S. § 1396(d)(q)(2)(Supp. 1998) ... 1, 10, 15

State:

A.R.S. § 36-2901(4) ... 6

A.R.S. § 36-2907(A)(11) ... 2

A.R.S. § 36-2907(A)(11)(as amended) ... 3

A.A.C. R9-22-341 ... 15

APPENDIX

APPENDIX A- A.R.S. § 36-2901(4)....................................1a
APPENDIX B- Current A.R.S. § 36-2907(A)(11)
(as amended)...4a
APPENDIX C- Former A.R.S. § 36-2907(A)(11) 7a

OPINION BELOW

The Memorandum Decision of the Arizona Court of Appeals is an unreported decision numbered 1 CA-CV98-0311. The denial of review by the Arizona Supreme Court is numbered CV99-0131-PR.

GROUNDS FOR JURISDICTION

1. The Court of Appeals of the State of Arizona, Division One, entered its Memorandum Decision on February 23, 1999. (App. 1, Petition for Writ of Certiorari, hereinafter referred to as "Petition").
2. The petition for review to the Arizona Supreme Court to review the decision of the Court of Appeals was denied on August 30, 1999. (Petition, App. 14).
3. The mandate from the Arizona Court of Appeals issued September 20, 1999. (Petition, App. 12).
4. Jurisdiction here is based upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. 42 U.S.C.S. § 1396(d)(q)(2) (1993) establishes that the "Secretary" makes specific determinations

regarding an individual's impairment, earnings, and eligibility.

2. 42 U.S.C.S. § 1396(d)(q)(2) (Supp. 1998) establishes that the "Commissioner of Social Security" makes determinations as to whether a person is a "qualified severely impaired individual."

3. A.R.S. § 36-2907 (A)(11) (in effect at the time of Bradley's, Donaldson's, and Bravo's transplants) provided:

> A. Unless modified pursuant to subsection H, I, or N of this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:
>
> 11. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician . . .and in addition to other medically necessary transplants and immunosuppressant medications for these transplants ordered on prescription by a physician . . .and allowed as an early and periodic health screening and diagnosis and treatment service for eligible persons . . .No other organ transplants may be covered by the [AHCCCS] system unless specifically required by federal law for persons defined pursuant to § 36-2901, paragraph 4, subdivision (b) [Title XIX categorically eligible].

4. A.R.S. § 36-2907(A)(11)(a), (c) and (d) (as amended subsequent to the plaintiffs' transplants):

A. Unless modified pursuant to this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

11.(a) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b) [Title XIX categorically eligible], medically necessary heart, liver, kidney, cornea and autologous and allogenic bone marrow transplants;

(c) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a) ["medically indigent" per state law], (c) ["medically needy" per state law] and (h) [eligible children], medically necessary kidney . . . transplants . . .;

(d) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary heart, liver . . . transplants . .

STATEMENT OF THE CASE

Of all the cases brought before this Court for review, this must be one of the least significant. This case presents an insular issue unlikely to recur due to a subsequent change in law. The only issue throughout this entire matter is who should pay for the transplant procedures for plaintiffs Bravo, Bradley and Donaldson. Under the law at the time, AHCCCS (the Arizona Health Care Cost Containment System), Arizona's Medicaid agency, was authorized to provide transplants only for federal categorically eligible persons, and these three patients were not categorically eligible; thus, AHCCCS could not provide these procedures. Petitioner Pima County was aware of this; yet, provided the transplant procedures nonetheless and now does not want to bear the financial consequences of its own decision.

Under current law, all three would have been covered for their respective transplants as MN/MI (Medically Needy/Medically Indigent) eligible under the state's voluntary supplement to the Medicaid program. The Arizona state legislature's subsequent decision to cover transplants for those individuals that are not federal categorically eligible renders this case a mere dispute over money between the State of Arizona and Pima County. None of the issues raised by this case will recur here because of the legislative changes.

The Arizona Court of Appeals correctly recognized this, and also correctly recognized the permissible distinction between federal categorical eligibility and state MN/MI eligibility for AHCCCS benefits. Given the facts and the applicable state and federal laws at that time, the Arizona Court of Appeals properly interpreted and applied those laws in determining that there was no authority to "deem" Bradley, Donaldson, or Bravo categorically eligible under any theory.

Bradley: Bradley qualified under the federal Aid to Families With Dependent Children program ("AFDC") and as a result qualified as categorically eligible for AHCCCS benefits beginning March 1, 1993. In August, 1993, Bradley was found eligible by the Social Security Administration ("SSA") for Supplemental Security Income ("SSI") benefits, which were awarded retroactive to March, 1993. At the same time, Bradley was found to be disabled and entitled to Social Security Disability ("SSD") payments as of August, 1993. By virtue of Bradley's eligibility for SSD benefits in August of 1993, he was determined ineligible for SSI and AFDC benefits, and was terminated from those programs. As a result, Bradley lost his categorical eligibility for AHCCCS benefits, and therefore did not qualify for a heart transplant through AHCCCS. Bradley did become eligible for other AHCCCS benefits under the state's supplement to the Medic aid program, known as the Medically

Needy/Medically Indigent ("MN/MI") Program,[1] which did not then cover transplants.

Bradley then applied to Pima County for the transplant. Bradley's request was approved on May 23, 1994, under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Bradley was not categorically eligible, and therefore was not entitled to receive the transplant through AHCCCS.

Bradley received a heart transplant on January 24, 1995. Although Bradley was MN/MI eligible for other AHCCCS benefits at the time of his heart transplant on January 24, 1995, he was not categorically eligible for the transplant.

Donaldson: Donaldson became MN/MI eligible for AHCCCS benefits in September, 1993. Eventually, Donaldson became categorically eligible in June of 1994, retroactive to May of 1994. Beginning November 1, 1994, Donaldson became eligible for SSD benefits which terminated his categorical eligibility for AHCCCS benefits. He thereafter was not eligible for a transplant through AHCCCS.

---

[1] The basic categories of eligibility for AHCCCS benefits are codified at A.R.S. § 36-2901(4)(b) (federal categorical eligibility) and A.R.S. § 36-2901(4)(a) and (c) (state MN/MI eligibility) (1a).

Donaldson applied to Pima County for a liver transplant. Donaldson's request was approved under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Donaldson was not categorically eligible, and therefore was not entitled to the transplant through AHCCCS.

On January 24, 1995, Donaldson was given a liver transplant. At the time of his transplant, Donaldson was not categorically eligible, and transplants were not a covered service for him.

Bravo: Bravo was never categorically eligible for AHCCCS benefits. On May 25, 1994, Bravo's request for a transplant was denied by AHCCCS based on the fact that she was not categorically eligible. Bravo applied to Pima County for a transplant. Bravo's request was approved on June 21, 1994, under the Pima County Board of Supervisors' policy providing for payment of transplants by Pima County as the payor of last resort for individuals not otherwise eligible for such transplants through AHCCCS. The Pima County Board of Supervisors determined at the time that Bravo was not categorically eligible, and therefore was not entitled to a transplant through AHCCCS. On November 23, 1994, Bravo received a heart transplant.

ARGUMENT

A. Reasons For Denying the Petition

This Court should exercise its discretion to deny review, because the decision of the Arizona Court of Appeals has no further impact beyond this case. It will not affect the three patients named here: Bradley, Bravo, and Donaldson, because they received their transplants long before this action commenced. It will not affect transplant requests in Arizona, now or in the future. The state legislature has since changed the law, so that persons now who are not federally categorically eligible, but who are state MN/MI eligible, are also eligible to receive transplants. This case, thus, is simply an issue of money between Pima County and the State of Arizona.

Pima County tries to present this as a case about "notice" in an attempt to meet the prerequisites for a Petition for Writ of Certiorari. However, this approach is erroneous. The Social Security Administration ("SSA"), not AHCCCS, determines a person's federal categorical eligibility. The SSA also decides when that eligibility is terminated and sends notice of such termination and appeal rights to the affected person. Both Bradley and Donaldson were clearly notified of their appeal rights by the SSA, yet failed to appeal. With respect to Bravo, she was never categorically eligible, and thus could never have qualified for her transplant through AHCCCS. The Arizona Court of Appeals also properly rejected Pima County's "similarly situated" argument, recognizing the proper distinction between a state's optional supplemental MN/MI coverage and federal categorical eligibility coverage under Title XIX.

Further, the Pima County Board of Supervisors was aware prior to providing these transplants that these three patients were not covered by AHCCCS, and therefore, that any financial burden would necessarily be borne by Pima County. It was only after authorizing these services that Pima County reversed itself and tried to force AHCCCS to reimburse it.

There is no compelling reason for this Court to accept review of this matter. Because of the legislative changes, this decision has no impact on future requests for transplants. This matter has significance only to Petitioner Pima County, which would like to avoid the consequences of its own decisions. These reasons clearly are insufficient for granting the Petition for Writ of Certiorari, and it should thus be denied.

B. Misstatements of Fact and Law in the Petition

1. Petitioners misstate the law to the extent they imply AHCCCS had a duty, statutory or otherwise, to notify Bradley and Donaldson of other ways by which they could attempt to continue their federal categorical eligibility. (Petition, pp. 4 and 5).
2. Petitioners misconstrue and misstate the law by claiming that AHCCCS, a state agency, is authorized to make determinations regarding a person's social security assistance eligibility status, when this authority lies with the

Secretary (and now the Commissioner) of the Social Security Administration. (Petition, p. 14; 42 U.S.C.S. § 1396d(q)(2)(1993) and 42 U.S.C.S. § 1396d(q)(2)(Supp., 1998).

3. Petitioners misstate and misrepresent the facts and proceedings below by asserting that the issue of whether organ transplants are a "required service under Medicaid statutes or regulations for categorically eligible persons" is properly raised here. To the contrary, this issue was never raised below, is not properly before this Court, and should not be considered in the event review is granted. (Petition, pp. 14-15). In fact, until now Petitioners have consistently argued that the three patients either were categorically eligible or should have been "deemed" categorically eligible.

C. Bradley and Donaldson Did Receive Notice of their Appeal Rights

Petitioners argued below that Bradley and Donaldson should have been "deemed" categorically eligible, even though they were not, on the basis that they allegedly did not receive a "JASSO" notice from AHCCCS. The Arizona Court of Appeals properly rejected this argument because Bradley and Donaldson did, in fact, receive notice of termination of their SSI benefits and their appeal rights[2]. The

---

[2] Bravo was never entitled to receive such a notice because she was never categorically eligible.

Court of Appeals correctly found that: (1) both Bradley and Donaldson did receive notice from the SSA, informing them that they were no longer categorically eligible and of their appeal rights; and (2) there is no authority to "deem" Bradley and Donaldson eligible when the controlling law at that time provides they were not.

Pima County argued that the only way to rectify AHCCCS's alleged error is to deem both Bradley and Donaldson categorically eligible, apparently for all purposes and for some undetermined length of time. Even assuming AHCCCS did not send the JASSO notices, there is no authority for Petitioners' proffered remedy of "deeming" them categorically eligible.

Bradley was provided formal notice of his termination of SSI benefits from the SSA, along with his appeal rights. As a part of the notice of termination of benefits, Bradley was told:

> Since you are not eligible now for SSI, you are also not eligible now for Medicaid based on SSI. However, if you need help with medical bills, you may still be eligible for medical assistance. Also, you may be eligible for Medicaid for the months we paid you SSI.

> Contact the Arizona Health Care Cost Containment System (AHCCCS) Administrator for information about your State's medical assistance programs and your eligibility for Medicaid. When you visit that agency, please take this letter with you. It will help the people there answer your questions.

That notice also outlined in detail Bradley's appeal rights:

> If you disagree with the decision, you have the right to appeal. We will review your entire case, even the parts you agree with. We also will consider any new facts you have and then will make a new decision. . .
>
> - You have 60 days to ask for an appeal.
> - The 60 days start the day after you receive

his letter. We assume you got this letter 5 days after the date on it unless you show us you did not get it within the 5-day period.

- You must have a good reason for waiting more than 60 days to ask for an appeal.

- To appeal, you must fill out a form called "Request for Reconsideration." The form number is SSA-561. To get this form, contact one of our offices. We can help you fill out the form.

The notice also explains the different ways to appeal (Case Review or Informal Conference), what to do "If You Want

Help With Your Appeal," and where to call and/or write with any questions.

Bradley was thus not deprived of notice of his right to appeal the determination made by the SSA, and there was no due process violation. Further, to regain his federal categorical eligibility, Bradley would have had to successfully appeal the termination of his SSI benefits, which is an appeal to the SSA. See Disabled Rights Union v. Kizer, 744 F.Supp. 221 (C.D.Cal. 1990). Bradley never appealed to the SSA.

Donaldson was also given specific notice of his termination of benefits and his appeal rights and the fact that continued federal categorical eligibility was necessary for coverage of his transplant. Donaldson did not challenge the termination of benefits. Pima County, having knowledge of the circumstances, did nothing to challenge the SSA's decision. Under these circumstances, neither Pima County nor Donaldson can fairly claim that there is a logical nexus between the alleged failure to send a JASSO notice to Donaldson and the state's denial of his transplant in January of 1995, as the Court of Appeals properly decided.

Pima County's own witness at the administrative hearing, Ms. Norma Stephens, the County's eligibility administrator, testified unequivocally that any failure to send the required JASSO notices had no bearing on whether Bradley and Donaldson should have been afforded coverage of their respective transplants. Pima County's representative at the hearings before AHCCCS, William Cole, confirmed that nothing that AHCCCS did, or did not do, affected the fact that these patients were not categorically eligible at the time of their transplants. Having conceded that AHCCCS' alleged failure to send a JASSO notice to Bradley and Donaldson has no significance regarding whether these individuals are entitled to coverage, Pima County's position is specious, at best, as the Court of Appeals recognized.

Petitioners misconstrue the AHCCCS regulation at Arizona Administrative Code ("A.A.C.") R9-22-341. (Petition, p. 12 and App. 54). As the title makes clear, this regulation addresses the processing of a person's state MN/MI application once that person loses his federal categorical eligibility as a result of the SSA's action terminating that person's SSI benefits. The regulation prioritizes the processing of these applications so that a person may become eligible at least for state MN/MI benefits as soon as possible, even though the person is no longer eligible for the federal categorical benefits. Nowhere in that regulation, or anywhere else, is AHCCCS (a state agency) authorized to make determinations regarding a person's federal categorical eligibility – a determination authorized to be made only by the Secretary of the SSA (a federal agency) pursuant to federal statute.[3] Notwithstanding the fact that Petitioners misconstrue that regulation, the mere suggestion that a state agency's own regulation could somehow supersede a federal statute is absurd. The Court of Appeals properly rejected this argument.

---

[3] As the Arizona Court of Appeals noted, the statute has been amended to provide that the "Commissioner of Social Security" must now make such determinations. 42 U.S.C.S. § 1396d(q)(2)(Supp. 1998); Petition, App. 5, fn. 2.

No evidence was presented at the administrative hearing that Bradley or Donaldson would have, or could have, done anything to prevent their eligibility status from changing from federally categorical eligibility to state MN/MI eligibility. They were given notice of termination of their federal benefits, and hence their categorical eligibility, and nothing was done that changed their respective eligibility status. The individual patients did not testify and, thus, there is no evidence that they would have done anything differently had they received a JASSO notice. Without any evidence that the alleged failure to provide a JASSO notice resulted in prejudice to Bradley and Donaldson, they are not entitled to any relief. See People ex rel. Hartigan v. Peters, 871 F.2d 1336, 1340 (7th Cir. 1989).

D. The Court of Appeals Properly Found Bravo Not "Similarly Situated" to Categorically Eligible Recipients

Pima County's faulty "similarly situated" argument arises from the language of 42 U.S.C.S. § 1396b(i) and two cases, relied upon by Pima County, that discuss the issue in far different contexts, Dexter v. Kirschner, 984 F.2d 979 (9th Cir. 1992) and Salgado v. Kirschner, 179 Ariz. 301, 878 P.2d 659 (1994). The plain language of the statute evidences the problem with Pima County's argument, and the cases relied upon are inapposite.

Pima County's argument regarding "similarly situated" individuals misses the point. The statute, 42 U.S.C.S. § 1396b(i), pertains solely to conditions upon which payment will be made by the federal government to the state and, hence, has no relevance or application to state MN/MI eligibility. It is clear, based on the terms of the statute, that the conditions tied to funding of transplants are conditions upon which payment will be made by the federal government to the state. See Dexter, 984 F2d. at 983. The term "similarly situated" is a specifically defined term of art in the federal context, which refers to treating members within the same eligibility group (i.e. categorically eligible members) alike. It does not refer to treating members of different eligibility groups (i.e. federal categorically eligible versus state MN/MI eligible) the same; otherwise, it would make no sense to draw distinctions between different eligibility groups.

The federal government provides no funding for the services provided to the state's MN/MI population. Thus, restrictions or conditions placed on the funding of transplants for federal categorically eligible recipients (i.e., that similarly situated individuals be treated alike) have no bearing on the decision to limit transplant coverage to that class. In this case, these individuals were not categorically eligible and, thus, the restrictions or conditions placed upon the funding of transplants for that eligibility population are inapplicable. Because Dexter and Salgado deal only with the federal categorically eligible group and do not make comparisons with the state MN/MI group, both cases are inapplicable.

The federal “similarly situated” requirements of §1396b(i) are addressed only to those who are federal categorically eligible. It is the State of Arizona that has voluntarily addressed the needs of its MN/MI population. By virtue of all the above, the Court of Appeals correctly found that Bravo is not "similarly situated" to a categorically eligible recipient, especially when she clearly was never categorically eligible.

CONCLUSION

This case does not raise significant issues nor will it have an impact on any other transplant request in Arizona because of subsequent changes in the law made by the Arizona state legislature. The Arizona Court of Appeals gave due consideration to the issues and properly addressed them. The Arizona Supreme Court apparently recognized this as well, and properly denied review. There is no reason for this Court to conduct further review, and this Petition should therefore be denied.

Respectfully submitted,

LOGAN T. JOHNSTON
Counsel of Record

ANNE C. LONGO
JOHNSTON & DODD, P.L.C.
Attorneys for Respondents
One North First Street, Suite 700
Phoenix, AZ 85004
(602) 452-0600

APPENDIX A- A.R.S. § 36-2901. Definitions

In this article, unless the context otherwise requires:

* * *

4. (a) "Eligible person" means any person who is: Classified as an indigent pursuant to § 11-297.

(b) Under federal law any of the following:

(i) Defined as mandatorily eligible pursuant to title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code section 1396a (1980)).

(ii) Beginning October 1, 1986, under the age of eighteen years and defined as optionally eligible pursuant to title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code sections 1396a(a)(10)(A)(ii)(I) and 1396d(a)(i)).

(iii)Defined as an eligible pregnant woman, and an infant under the age of one year, pursuant to § 1902(*l*)(1)(A) and (B) of title XIX of the social security act, as amended by § 4603 of the omnibus budget reconciliation act of 1990, and whose family income does not exceed one hundred forty percent of the federal poverty guidelines as published by the United States department of health and human services and children defined as eligible children who have not attained nineteen years of age pursuant to § 1902(*l*)(1)(D) of title XIX of the social security act, as amended by the § 4601 of the omnibus budget reconciliation act of 1990, and whose family income does not exceed one hundred percent of the federal poverty guidelines as published by the United States department of health and human services, and children defined as eligible pursuant to § 1902(*l*)(1)(C) of title XIX of the social security act, as amended by § 6401 of the omnibus budget reconciliation act of 1989, and whose family income does not exceed one hundred thirty-three percent of the federal poverty guidelines as published by the United States department of health and human services.

(iv) Defined as optionally eligible pursuant to section 1902(a)(10)(A)(ii)(I) of the social security act (42 United States Code §1396a(a)(10)(A)(ii)(I)).

(c) Classified as a medically needy person pursuant to this article.

APPENDIX B- [Current] A.R.S. § 36-2907. Covered health and medical services; definitions; modifications; related delivery of service requirements

A. Unless modified pursuant to this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

* * *

11. Transplants as authorized in this paragraph that are medically necessary and not experimental, as determined by the administration. The following transplants are authorized:

(a) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b), medically necessary heart, liver, kidney, cornea and autologous and allogenic bone marrow transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17.

Appendix B

(b) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivision (b), medically necessary lung and heart-lung transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

(c) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary kidney and cornea transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17.

(d) For individuals eligible for services pursuant to § 36-2901, paragraph 4, subdivisions (a), (c) and (h), medically necessary heart, liver, heart-lung, lung and autologous and allogenic bone marrow transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17, but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

(e) For persons who are eligible for services pursuant to § 36-2901, paragraph 4, subdivision (a), (b), (c) and (h), any other transplant authorized by the director but only if monies are available pursuant to § 36-2921, subsection A, paragraph 1.

APPENDIX C- [Former] A.R.S. § 36-2907. Covered health and medical services; definitions; modifications; related delivery of service requirements

Unless modified pursuant to subsection H, I or N of this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

* * *

11. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 and in addition to other medically necessary transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 and allowed as an early and periodic health screening and diagnosis treatment service for eligible persons under the age of twenty-one years and defined as eligible pursuant to § 36-2901, paragraph 4, subdivision (b) if federal financial participation is available under title XIX of the social security act for this service above the prepaid capitation amount for that person. No other organ transplants may be covered by the system unless specifically required by federal law for per

sons defined pursuant to § 36-2901, paragraph 4, subdivision (b).

Supreme Court, U.S.
FILED
JAN 5 2000
CLERK

③

No. 99-883

In The

Supreme Court of the United States

◆

SCOTT BRADLEY; MARY BRAVO; ROBERT
DONALDSON; PIMA COUNTY, ARIZONA,
a body politic,

Petitioners,

v.

JOHN H. KELLY, in his capacity as Director of
Arizona Health Care Cost Containment System; and
THE STATE OF ARIZONA,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The Court Of Appeals, State Of Arizona,
Division One**

◆

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

HOWARD BALDWIN
22 East University Boulevard
Tucson, Arizona 85705-7737
(520) 624-8527 phone
(520) 624-2418 fax

*Attorney and Counsel of
Record for Petitioners*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30pp

TABLE OF CONTENTS

Page

REPLY TO RESPONDENTS STATEMENT OF THE CASE 1

REPLY TO ARGUMENT 1

A. Reply to Reasons for Denying Petition 1

B. Reply to Alleged Misstatements of Fact and Law 2

Introduction 2

C. Reply to Allegation that Bradley and Donaldson Did Receive Notice of Their Appeal Rights 4

D. Reply to the Argument That the Court of Appeals Properly Found Bravo Not "Similarly Situated" to Categorically Eligible Recipients 6

CONCLUSION 7

TABLE OF AUTHORITIES

	Page
STATUTE	
42 U.S.C. § 1396b(i)	6
REGULATIONS	
42 CFR 431.243	3
42 CFR 435.1000, 1001, 1002, 1003, 1004, 1005, 1006 and 1007	7
42 CFR 435.4	7

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents interjected argument into their statement of the case, therefore Petitioner must respond. The issues raised in this case are anything but "insular" or just about "money" as Respondents assert.

The State of Arizona has played fast and loose with the notice and hearing requirements of the Constitution and of the federal statutes and regulations governing Medicaid. The State failed to give the required notice of termination of benefits and right to appeal to Bradley and Donaldson. The State failed to treat similarly situated Medicaid recipients the same. These are not insular issues. They are all encompassing issues of importance to the governance of each state's Medicaid system. These are issues of national import.

◆

REPLY TO ARGUMENT

A. Reply to Reasons for Denying Petition

The importance of this case is that if it is considered and decided in favor of Petitioners, it will provide guidance to Arizona and all other states on what must be done by the Medicaid agency when medical recipients' benefits are terminated. It will demonstrate that the important right of notice and right to a hearing each have serious meaning and must be followed.

It is also of national significance to instruct all of the states precisely what the scope and significance is of the requirement to treat all similarly situated Medicare recipients who need organ transplants the same.

These issues are of first impression and of great importance. These are truly significant federal questions concerning the frequently litigated federal Medicaid law which need to be decided.

B. Reply to Alleged Misstatements of Fact and Law

Introduction

Respondents do themselves, this Court, Petitioners and counsel for Petitioner a serious disservice when they allege misrepresentations on the part of Petitioner which did not occur. This is a futile attempt to create factual disputes that do not exist or an attempt to muddy a record that is very clear. The record in this case supports all of Petitioners' contentions clearly and unequivocally.

Moreover, these shibboleths constructed by Respondents are irrelevant to the two central issues in this case. It is AHCCCS who must give the notice of termination of medical benefits and notice of the rights to appeal such termination. It is not the duty of the Social Security Administration. It is also AHCCCS who must treat similarly situated persons the same.

1. Petitioners do not misstate by implication that the law requires a Medicaid agency such as AHCCCS to find other ways to continue eligibility for beneficiaries whose Medicaid eligibility has been terminated. Petitioners directly contend that such is true. That is the very thrust of R9-22-341 (see App. 54), the AHCCCS rule that

requires a re-determination of eligibility. If it is not the Medicaid agencies duty to assist its ill and disabled beneficiaries in every manner of gaining legitimate eligibility, who in the world would be responsible?

2. Petitioners do not insist that a Medicaid agency such as AHCCCS make eligibility determinations left to other agencies.[1] Petitioners do insist however that where there are dual responsibilities, the agencies are required to cooperate. (See 42 CFR 431.243, App. 62.) And, it is not the duty of the Medicaid recipient to bring this about. It is the duty of the state Medicaid agency (AHCCCS) to have the agency (Commissioner of SSA) that is responsible for the eligibility determination (qualified severely disabled person) to participate in an eligibility hearing. If the foregoing were not true, there could never be a determination made that a person fits that category for ongoing Medicaid benefits as a qualified severely disabled person. The law cannot operate in a vacuum.

3. The issue of whether organ transplants are a required service for those Medicaid recipients who are categorically eligible is an issue which Respondents themselves have introduced. Respondents have argued that it is proper to provide transplants to categorically eligible persons, but not to MN/MI eligible persons because the similarly situated requirements of the federal law only applies to the categorically eligible. They argue

---

[1] However, by agreement the Medicaid agency can pass on eligibility determinations to others or agree to make eligibility determinations that are the duty of the SSA among other agencies. See App. 131 for the agreement between AHCCCS and the SSA.

they have to provide transplant services to that group but do not have to provide transplant services to the MN/MI group. Respondents now argue this is not an issue in this case and is not raised by the record. This is preposterous. It is raised by the record, and the Respondents now find themselves on the wrong side of the issue, so rather than attempt a cogent argument against it, they try to make it go away. Clearly, organ transplants are not a mandated coverage.

C. Reply to Allegation that Bradley and Donaldson Did Receive Notice of Their Appeal Rights.

Respondents quote at length a notice from the SSA that advises Bradley and Donaldson of the termination of their SSI benefit. AHCCCS apparently wants this Court to believe that notice advises the recipient of the termination of their AHCCCS Medicaid benefits the right to appeal that termination. It does not. Respondents also want this Court to believe that the SSI notice informs the recipient of the right to appeal the termination of the Medicaid benefits to AHCCCS. It does not. The SSI notice only advises the recipient of the termination of the SSI benefits and the right to appeal the termination of the SSI benefits to the SSA, which is not something Bradley or Donaldson would have wanted to do because their SSI had been replaced by SSD payments.

The lack of notice and hearing which is the focus here is the failure of AHCCCS to follow the federal law, or for that matter its own regulation which requires a written notice of termination advising of the right to appeal to be sent by AHCCCS.

Respondents' argument that the SSA notice of termination somehow takes care of the duty of AHCCCS and other Medicaid agencies to give appropriate and adequate notice of termination of Medicaid benefits and the right to appeal such termination demonstrates better than anything Petitioners can say precisely why this Court must intercede. It is precisely this attitude of the state passing the buck to the federal agencies that must be addressed by this Court.

Arizona, and undoubtedly other states as well, reflects the all too prevalent social attitude of "it's not my job, it's the other guy's job". Here, the State of Arizona, through its AHCCCS Medicaid plan, has demonstrated a history of playing fast and loose with the due process rights of its Medicare recipients.[2] Its attitude, regrettably, is that the SSA will take care of it. AHCCCS says, "it's not our job".

Their attitude flies in the face of due process requirements and the standard set by Congress and the statutes and regulations of the State of Arizona for the treatment of terminated Medicaid recipients.

---

[2] The federal cases directly concerning AHCCCS' past failures to give proper notice are cited on page 11 of the Petition.

D. Reply to the Argument That the Court of Appeals Properly Found Bravo Not "Similarly Situated" to Categorically Eligible Recipients.

The Respondents apparently concede that once a state determines to provide medical care that is not a mandatory coverage, the state must do so in a manner that fully complies with federal regulations and statutory law. If this is true, Respondents have no basis for stating that § 1396b(i) applies only to categorically eligible persons and not MN/MI eligible persons. To justify their position, the Respondents simply say that § 1396b(i) does not apply to the MN/MI eligible. They cite no regulation, no statute, no interpretation and no statement of legislative intent. Fortunately, Respondents have no authority to proclaim what was intended by Congress. The plain meaning of § 1396b(i) is that once a state determines to give the non-mandatory coverage of life saving organ transplants, it must provide them to eligible Medicaid recipients regardless of whether that recipient is labeled categorically eligible or MN/MI eligible so long as they are similarly situated to others needing the same type of organ transplant.

The Respondents make the following statement in their brief in opposition:

"The federal government provides no funding for the services provided to the state's MN/MI population." (Emphasis in original; Respondents' brief page 17, paragraph 2). The Respondents are not being candid. The federal regulations allow funding to the states in many respects for the medically needy. Medically Needy (MN) is defined as those persons such as Bradley, Donaldson and Bravo who became eligible by spending down. (42 CFR 435.4, see App. 143.)

Various sections of the code of federal regulations specify the many ways in which the state receives funds, referred to as federal financial participation (FFP) for services to the medically needy. (See 42 CFR 435.1000, 1001, 1002, 1003, 1004, 1005, 1006 and 1007, App. 143-149.)

◆

CONCLUSION

This case seriously merits consideration by this Court. State Medicaid agencies need guidance for their roles in giving proper termination and right to hearing notices. The agencies need to have this Court precisely delineate the minimum that is expected to satisfy federal law benefiting Medicaid eligible recipients, particularly where as it was here that the question of having or not having the benefits is the difference between life and death.

States need to know that MN/MI eligible persons are not the stepchildren of the Medicaid system where life saving organ transplants are concerned. This Court needs to clarify that they are indeed similarly situated to the categorically eligible. This Court needs to address this issue so that the working poor of this nation will be treated at least as well as those who have never worked, especially where the decision to terminate benefits can be a death sentence.

Respectfully submitted,

HOWARD BALDWIN
(*Counsel of Record*)
LAW OFFICE OF HOWARD BALDWIN
22 East University Boulevard
Tucson, Arizona 85705-7737
(520) 624-8527

Attorney for Petitioners

SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

(Agreement with the State Pursuant to
Section 1634 of the Social Security Act)

AGREEMENT

Between

The
Commissioner of Social Security

and

The State of Arizona

The Commissioner of Social Security, hereinafter referred to as the Commissioner, and the State of Arizona, hereinafter referred to as the State, pursuant to section 1634 of the Social Security Act (providing for Federal determinations of eligibility for medical assistance in the case of aged, blind, or disabled individuals who are applicants for or recipients of Supplemental Security Income benefits and/or federally-administered State supplementary payments) hereby agree to the following:

Article I

DEFINITIONS

For purposes of this Agreement –

A. The term "Commissioner" means the Commissioner of Social Security or his or her designee(s).

B. The term "State" means the State of Arizona, including any subdivision thereof, acting through the Arizona Health Care and Cost Containment System (AHCCCS).

C. The term "Act" means the Social Security Act.

D. The term "benefits under title XVI" means Supplemental Security Income payments from Federal funds made pursuant to sections 1611(b) and 1619(a) of the Act, as well as optional State supplementary payments made by the Commissioner with State funds on behalf of the State pursuant to an agreement entered into under section 1616(a) of the Act, and mandatory State supplementary payments made by the Commissioner with State funds on behalf of the State pursuant to an agreement entered into under section 212(b) of Public Law (P.L.) 93-66. Individuals with special supplemental security income eligibility status pursuant to section 1619(b) of the Act shall be considered to be receiving benefits under title XVI.

E. The term "supplemental security income program" means the Federal program of Supplemental Security Income for the Aged, Blind, and Disabled established by section 301 of the Social Security Amendments of 1972, P.L. 92-603, and subsequent amendments, and codified under title XVI of the Act.

F. The term "Medicaid" means medical assistance provided by the State under the State plan approved under title XIX of the Act.

G. The term "regulations" means those regulations promulgated by the Commissioner in accordance with the Administrative Procedure Act, 5 U.S.C. 551 et. seq.

H. The acronym "HCFA" refers to the Health Care Financing Administration in the United States Department of Health and Human Services and to its employees.

I. The acronym "SSA" refers to the Social Security Administration and to its employees.

J. The acronym "BENDEX" refers to the Beneficiary and Earnings Data Exchange. The BENDEX is an electronic data exchange system containing information about benefits under titles II and XVIII of the Act. BENDEX data are supplied to the State under the terms of an agreement between SSA and each State.

K. The acronym "SDX" refers to the State Data Exchange. The SDX is an electronic data exchange system containing information about benefits under title XVI. Also, in States which have completed agreements with SSA providing for Federal determinations of eligibility for medical assistance in the case of aged, blind, or disabled individuals who are applicants for or recipients of Supplemental Security Income benefits and/or federally-administered State supplementary payments, SDX records contain information about categorical eligibility for medical assistance under title XIX of the Act. SDX data are supplied to the State under the terms of an agreement between SSA and each State.

Article II

FUNCTIONS TO BE PERFORMED BY THE COMMISSIONER

The Commissioner shall:

A. Make determinations (including redeterminations) of Medicaid eligibility on behalf of the State with respect to individuals residing in the State using the criteria established under title XVI of the Act to determine eligibility for supplemental security income benefits as a disabled, blind, or aged individual. Such determinations of eligibility shall be made only with respect to persons who have been determined to be eligible for benefits under title XVI of the Act.

B. Make redeterminations of eligibility for Medicaid as frequently as redeterminations are made with respect to eligibility for benefits under title XVI.

C. Send to the State on a timely basis information with respect to such determinations and redeterminations (and status changes related thereto) of Medicaid eligibility by means of the SDX.

D. Furnish to the State any or all of the following by means of paper or electronic media (as decided by the Commissioner):

   - SDX data relevant to Medicaid eligibility supplied under the terms and conditions of the State's Agreement with the Commissioner relating to the SDX and BENDEX,
   - third party payor information received with the title XVI application or at the title XVI redetermination,
   - information concerning an individual's refusal to assign rights to payments for medical services to the Medicaid State agency,
   - information regarding unpaid medical expenses incurred by the individual in the three months before the filing date of the title XVI application,

   and other related and necessary information secured in connection with such applications in cases where the individuals are determined to be ineligible for benefits under title XVI to assist the State in carrying out its functions under its Medicaid program.

   The Commissioner shall make every effort to comply with any State request made hereunder for data in not more than 90 days from the date of receipt of such request in order for the State to carry out its responsibilities under the Medicaid program.

E. In carrying out the functions set forth in this Article, establish procedures to detect and investigate fraud or program abuse in the supplemental security income program and make prompt reports to the State on such cases. This provision shall be understood not to preclude the Commissioner from taking appropriate action where the fraud or abuse may constitute an offense committed against the United States.

F. Perform such other functions as may be required by law, regulations, or by the Commissioner and the State through a written modification of this Agreement.

Article III

FUNCTIONS TO BE PERFORMED BY THE STATE

The State shall:

A. Provide Medicaid eligibility to all individuals eligible for benefits under title XVI of the Act.

B. Provide written notification of eligibility to individuals determined to be eligible for Medicaid by the Commissioner on behalf of the State. In addition, the State shall furnish notification to individuals who have filed an application with the Commissioner whom the State determines are not eligible for Medicaid, advising them of such determination.

C. Continue to perform the functions specifically listed in Article II above, including, but not limited to, making determinations of retroactive eligibility for Medicaid, any issuance of emergency authorizations, any outstationing [sic] of eligibility workers at providers as required, administering and operating cost-sharing systems, and issuance and control of identification cards and other notices.

D. Perform such other administrative functions as are necessary to carry out the terms of this Agreement.

Article IV

COSTS

A. As provided for in Appendix A, the State shall pay one-half of SSA's costs incurred, which are additional to the costs incurred by SSA in carrying out the requirements of title XVI of the Act, for making Medicaid determinations, collecting information for Medicaid purposes which is related to making Medicaid determinations, and providing that information to the State for the purposes of making Medicaid determinations.

B. The State shall pay the full additional cost to SSA for any statistical or other studies and any other services which SSA agrees to provide to the State which are not directly related to making Medicaid eligibility determinations.

C. If the Commissioner and the State are unable to agree on any question of performance arising under this Agreement, the State may appeal the question to the Commissioner of Social Security. The Commissioner shall, within 90 days from the receipt of such appeal, make a determination in writing with a full explanation thereof, or provide the State written notification of the reason such determination cannot be made within said 90 days, what further information or action by the parties may be required, and within what time period a determination is expected to be made. The Commissioner's determination shall be the final decision of the Social Security Administration. Pending the determination of the Commissioner, the State and the Commissioner shall proceed diligently with the performance of this Agreement.

Nothing in this Agreement shall be construed to waive any right the State may have to seek judicial review by a court of competent jurisdiction of both findings of fact and conclusion of law contained in the Commissioner's determination, or to enforce its right under this Agreement by any available remedies. Nothing in this Agreement shall be construed as waiving the Commissioner's right to assert lack of jurisdiction with respect to any suit brought under this Agreement, or to enforce the Commissioner's right under this Agreement by any available remedies.

Article V

LIMITATION OF LIABILITY

The Commissioner shall not be responsible for any financial loss incurred by the State, whether directly or indirectly, through the use of any data furnished pursuant to this Agreement.

Article VI

CONFIDENTIAL NATURE AND LIMITATION ON USE OF INFORMATION AND RECORDS

A. The Commissioner and the State shall adopt and maintain policies and procedures to ensure that information contained in their respective records and obtained from each other or from others in carrying out their functions under this Agreement shall be sued by them and disclosed solely as provided in section 1106 of the Act, the regulations promulgated thereunder at 20 CFR part 401, and this Article.

B. The Commissioner shall not disclose to any individual or organization any information or records received from the State pursuant to the provisions of the Agreement except as permitted by Federal Law (e.g., section 1106 of the Act, the Privacy Act, 5 U.S.C. 552a, the Freedom of Information Act, 5 U.S.C. 552, and regulations promulgated thereunder).

C. The State agrees that unless it first obtains the Commissioner's express, written approval, it will make no use or disclosure of any information or records which the Commissioner furnishes to the State from a system of records covered by the Federal Privacy Act, except for those routine uses which the Commissioner publishes in the Federal Register for that system of records.

D. The State agrees that unless the State first obtains the Commissioner's express, written approval, it will not disclose information described in section C. of this Article for a particular program purpose pursuant to a published routine use covering unspecified income or health maintenance programs.

E. If the Sate agency which receives any information or records furnished by the Commissioner (e.g., information on the SDX) pursuant to the terms of this Agreement discloses the said information or records pursuant to a routine use described in sections C. and D. of this Article, the State agency shall only provide the elements or portions thereof which are necessary to accomplish the purposes identified in that routine use. Any element or portion thereof which is not necessary to accomplish those purposes shall not be provided.

F. The State agrees that it will keep a record of disclosures which it makes under a routine use, described in section C. and D. of this Article, to any officer or employee of a nongovernment agency or a local government or a political subdivision of the State in connection with an income or health maintenance program for which that agency, subdivision or local government is solely responsible. The State further agrees to timely furnish to the Commissioner, upon request, that record of disclosures. Such record shall describe the information disclosed including the date of the disclosure, identify the persons or agencies to whom the State disclosed, and state the purpose(s) of the disclosures.

G. Nothing in this Article shall prohibit the State from disclosing information to the Commissioner or HCFA or the individual to whom the information pertains.

H. The State agrees to the following conditions regarding safeguards to protect data to be furnished by the Commissioner from unauthorized use or disclosure:

1. To limit access to the data to only those employees and officials who need it to perform their official duties in connection with this Agreement or who may otherwise receive the data under the conditions of this Article (these individuals may be employees or officials of the State, or political subdivision responsible for the State's Medicaid program under an approved Medicaid State plan under title XIX of the Act or employees or officials of HCFA);

2. To store the data in an area that is physically safe from access by unauthorized persons;

3. To store and process magnetic media in such a way that unauthorized persons cannot retrieve

the information by means of a computer, remote terminals, or other means;

4. To advise all personnel who will have access to the data of the confidential nature of the information, the safeguards required, and the criminal sanctions for noncompliance contained in Federal statutes (such as section 1106(a) of the Act), and any relevant State statutes; and

5. To permit employees of the Social Security Administration to make onsite inspections to ensure that adequate safeguards are being maintained.

Article VII

TERM OF AGREEMENT

This Agreement shall begin on October 1, 1997 and end on September 30, 1998. It will automatically be renewed for successive periods of one year unless the State or the Commissioner gives written notice not to renew at least 90 days before the end of the current period.

Article VIII

TERMINATION AND MODIFICATION OF AGREEMENT

A. The Agreement may be modified in writing at any time by mutual consent of the parties hereto.

B. The Commissioner or the State may terminate this Agreement at any time upon 120 days written notice to the other party.

C. Nothing in this Agreement shall be construed to preclude the Commissioner from terminating this Agreement in less than 120 days if the State fails to comply materially with the terms of section A. of Article III of this Agreement and fails to cure such noncompliance, or fails to show cause why such Agreement should not be terminated within a period of 30 days (or such longer period as the Commissioner may allow) after provision by the Commissioner of notice explaining the grounds for the proposed termination.

D. This Agreement supersedes all other Agreements and Modifications to Agreements for the Commissioner to make Medicaid determinations for the State.

In witness thereof, the parties hereby execute this Agreement this 6th day of April, 1998.

The Commissioner of Social Security
By /s/ Linda S. McMahon
Linda S. McMahon
Regional Commissioner, SSA

The State of Arizona
By /s/ Michael Veit
Michael Veit
Contracts & Purchasing
Administrator
Arizona Health Care Cost
Containment System

I, Gina L. Relkin, certify that I am the legal counsel of the Arizona Health Care Cost Containment System, State of Arizona; that Michael Veit who signed this Agreement on behalf of the State was then Procurement Officer of the Arizona Health Care Cost Containment System of said State, and is authorized to enter into Agreements of this nature on behalf of the State and that there is authority under the laws of the State of Arizona to carry out all the functions to be performed by the State as herein and comply with the terms of this Agreement.

/s/ Gina L. Relkin
Signature of Legal Counsel

APPENDIX A

RETROACTIVE MEDICAL EXPENSES

The Commissioner shall:

1. Require Social Security Field Offices to complete the Title XVI application question dealing with medical expenses in the 3 month retroactive period.
2. For the performance of these functions by the Commissioner, the cost will be one-half of the administrative costs incurred.

42 C.F.R. Sec. 435.4 Definitions and use of terms.

* * *

Medically needy refers to families, children, aged, blind, or disabled individuals, and pregnant women listed under subpart D of this part who are not listed in subparts B and C of this part as categorically needy but who may be eligible for Medicaid under this part because their income and resources are within limits set by the State under its Medicaid plan (including persons whose income and resources fall within these limits after their incurred expenses for medical or remedial care are deducted) (Specific financial requirements for determining eligibility of the medically needy appear in subpart I of this part.);

* * *

Subpart K – Federal Financial Participation

Sec. 435.1000 Scope.

This subpart specifies when, and the extent to which, FFP is available in expenditures for determining eligibility and for Medicaid services to individuals determined eligible under this part, and prescribed limitations and conditions on FFP for those expenditures.

FFP in Expenditures for Determining Eligibility and Providing Services

Sec. 435.1001 FFP for administration.

(a) FFP is available in necessary administrative costs the State incurs in determining and redetermining

Medicaid eligibility and in providing Medicaid to eligible individuals.

(b) Administrative costs include any costs incident to an eye examination or medical examination to determine whether an individual is blind or disabled.

Sec. 435.1002 FFP for services.

(a) Except for the limitations and conditions specified in Secs. 435.1007 and 435.1008, FFP is available in expenditures for Medicaid services for all recipients whose coverage is required or allowed under this part.

(b) FFP is available in expenditures for services provided to recipients who were eligible for Medicaid in the month in which the medical care or services were provided except that, for recipients who establish eligibility for Medicaid by deducting incurred medical expenses from income, FFP is not available for expenses that are the recipient's liability. (See Sec. 435.914 and Sec. 436.901 of this subchapter for regulations on retroactive eligibility for Medicaid.)

[43 FR 45204, Sept. 29, 1978, as amended at 44 FR 17939, Mar. 23, 1979]

Sec. 435.1003 FFP for redeterminations.

(a) If the Social Security Administration (SSA) notifies an agency that a recipient has been determined ineligible for SSI, FFP is available in Medicaid expenditures for services to the recipient as follows:

(1) If the agency receives the SSA notice by the 10th day of the month, FFP is available under this section only through the end of the month unless the recipient requests a hearing under subpart E, part 431 of this subchapter.

(2) If the agency receives the SSA notice after the 10th day of the month, FFP is available only through the end of the following month, unless the recipient requests a hearing under subpart E, part 431 of this subchapter.

(3) If a recipient requests a hearing, FFP is available as specified in subpart E, part 431 of this subchapter.

(b) The agency must take prompt action to determine eligibility after receiving the SSA notice.

(c) When a change in Federal law affects the eligibility of substantial numbers of Medicaid recipients, the Secretary may waive the otherwise applicable FFP requirements and redetermination time limits of this section, in order to provide a reasonable time to complete such redeterminations. The Secretary will designate an additional amount of time beyond that allowed under paragraphs (a) and (b) of this section, within which FFP will be available, to perform large numbers of redeterminations arising from a change in Federal law.

[43 FR 45204, Sept. 29, 1978, as amended at 44 FR 17939, Mar. 23, 1979; 62 FR 1685, Jan. 13, 1997]

Sec. 435.1004 Recipients overcoming certain conditions of eligibility.

(a) FFP is available, as specified in paragraph (b) of this section, in expenditures for services provided to recipients who are overcoming certain eligibility conditions, including blindness, disability, continued absence or incapacity of a parent, or unemployment of a parent.

(b) FFP is available for a period not to exceed –

(1) The period during which a recipient of AFDC, SSI or an optional State supplement continues to receive cash payments while these conditions are being overcome; or

(2) For recipients eligible for Medicaid only and recipients of AFDC, SSI or an optional State supplement who do not continue to receive cash payments, the second month following the month in which the recipient's Medicaid eligibility would have been terminated.

[43 FR 45204, Sept. 29, 1978, as amended at 45 FR 24887, Apr. 11, 1980]

Limitations on FFP

Sec. 435.1005 Recipients in institutions eligible under a special income standard.

For recipients in institutions whose Medicaid eligibility is based on a special income standard established under Sec. 435.236, FFP is available in expenditures for services provided to those individuals only if their income before deductions, as determined by SSI budget methodology, does not exceed 300 percent of the SSI benefit amount payable under section 1611(b)(1) of the Act to an individual in his own home who has no income or resources.

[58 FR 4933, Jan. 19, 1993]

Sec. 435.1006 Recipients of optional State supplements only.

FFP is available in expenditures for services provided to individuals receiving optional State supplements but not receiving SSI, if their income before deductions, as determined by SSI budget methodology, does not exceed 300 percent of the SSI benefit amount payable under section 1611(b)(1) of the Act to an individual who has no income and resources.

[45 FR 24887, Apr. 11, 1980]

Sec. 435.1007 Categorically needy, medically needy, and qualified Medicare beneficiaries.

(a) FFP is available in expenditures for covered services provided to categorically needy recipients, medically needy recipients, and qualified Medicare beneficiaries, subject to the restrictions continued in subpart K of this part and as provided in paragraphs (b) and (e) of this section. However, the restrictions listed in paragraphs (b) and (e) of this section do not apply to expenditures for medical assistance made on behalf of qualified Medicare beneficiaries under section 1905(p) of the Act; individuals receiving Medicaid as categorically needy under section 1902(a)(10)(A)(i)(I), (II), (III), (IV), (V), (VI), or (VII) and section 1902(a)(10)(A)(ii)(I), (IX), or (X) of the

Act; individuals who are eligible to receive benefits (or would be eligible for those benefits if they were not in a medical institution); and any individuals deemed to be members of the groups identified in this sentence.

(b) Except as provided in paragraphs (c) and (d) of this section, FFP is not available in State expenditures for individuals (including the medically needy) whose annual income after deductions specified in Sec. 435.831(a) and (c) does not exceed the following amounts, rounded to the next higher multiple of $100.

(1) For individuals, 133¹/₃ percent of the highest money payment amount most frequently made to one-person families without income and resources under the State's AFDC plan.

(2) For couples and families of two or more, 133¹/₃ percent of the highest money payment most frequently made under the State's AFDC plan to a family of the same size without income and resources. If the State's AFDC plan specifies a maximum family size beyond where there is no increase in benefits, the medically needy income levels for families whose size exceeds that maximum will be determined by adding an amount for each family member over the maximum size. These amounts must be reasonably related to the amounts by which the State's AFDC plan increases benefits for additional family members in families below the maximum size.

(c) In the case of a family consisting only of two individuals, both of whom are adults and at least one of whom is aged, blind, or disabled, the State of California may use the amount of the AFDC payment most frequently made to a family of one adult and two children for purposes of computing the 133¹/₃ percent limitation (under the authority of section 4103 of Public Law 100-230).

(d) For purposes of paragraph (b)(1) of this section, a State that as of June 1, 1989, has in its State plan (as defined in section 2373(c)(5) of Public Law 98-369 as amended by section 9 of Public Law 100-93) an amount for individuals that was reasonably related to 133¹/₃ percent of the highest amount of AFDC which would ordinarily be paid to a family of two without income or resources may use an amount based upon a reasonable relationship to such an AFDC standard for a family of two.

(e) FFP is not available in expenditures for services provided to categorically needy and medically needy recipients subject to the FFP limits if their annual income, after the cash assistance income deductions are applied and before the less restrictive income deductions under Sec. 435.601(c) are applied, exceeds the 133¹/₃ percent limitation described under paragraphs (b), (c), and (d) of this section.

[58 FR 4933, Jan. 19, 1993]

* * *